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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1969

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No. 135

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FREDERICK WALZ, *Appellant*,

v.

TAX COMMISSION OF THE CITY OF NEW YORK, *Appellee*.

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Appeal from the Court of Appeals
of the State of New York

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## BRIEF OF UNITED STATES CATHOLIC CONFERENCE, AMICUS CURIAE

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## INTRODUCTORY STATEMENT

The facts of record in this case, the pertinent New York constitutional and statutory provisions, the provisions of the United States Constitution involved, and the opinions of the courts below are set out in the briefs filed by the appellant and the appellee. This *amicus* accepts them for purposes of its own brief. Both parties

have consented in writing to the filing of this brief *amicus curiae* by the United States Catholic Conference.*

## THE INTEREST OF THIS AMICUS

USCC is an agency of the Catholic Bishops of the United States. Its predecessor, established in 1919, was known as the National Catholic Welfare Conference. The prime purpose of USCC is to unify and coordinate activities of the Catholic people of the United States in programs and works of education, social welfare, health and hospitals, family life, immigrant aid, poverty assistance, civic education, youth activities, communications and public affairs, with emphasis on the preservation of religious liberty in America.

Among its responsibilities, USCC is authorized to represent the Catholic people of the United States, speaking through their Bishops on matters of public concern. When deemed appropriate, USCC is authorized to offer its views, if permitted by court rule or practice, in Federal and State court litigation touching important interests of the Catholic people in the United States, especially in cases involving constitutional issues turning upon the proper construction of the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States, as that provision protects the freedoms guaranteed by the religion clauses of the First Amendment.

It is the concern of USCC that exemptions voluntarily granted by the tax laws of all the States for religious property used exclusively for religious activities not be

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*Hereinafter usually referred to as "USCC".

constitutionally forbidden by this Court. This *amicus* considers such tax exemptions of church properties, which have been extended by all the States to religious organizations (in the broadest sense of the term "religious"), to be one of the main bases of the American constitutional tradition under which State and Church remain respectful of one another but forever separate from each other. The deliberate, unbroken and universal practice of willingly affording tax exemptions for the property of religious organizations devoted to religious uses has a special efficacy and constitutional importance when the exemptions are those afforded to houses or places of religious worship. For this Court to require extension of the auditing eye and collecting hand of the State's tax authorities in this area would be an unnecessary mandate and, perhaps, an invidious disregard of the uniquely successful American experience in providing and protecting religious liberty for all citizens.

USCC also is of the opinion that other adverse consequences might occur, should the tax exemptions of the type involved in the instant case be forbidden. If such exemptions are abolished, it will be impossible for the churches to continue to carry on, at anything like their present level, those important public welfare activities of benefit to people, as well as to society and the State which for so long have been recognized as among the prime obligations of any church or organization worthy of the name "religious".

Some indication of the relative magnitude and importance of the public welfare activities conducted by the Catholic Church in the United States may be gained from the following statistics: At the present time agencies

connected with the Catholic Church are operating 834 hospitals in the United States which contain 156,838 beds (approximately 30% of the bed capacity for general hospitals in the Country). In 1967, these hospitals had 5,446,675 admissions. The school system is of comparable size. In 1967 there were 10,603 parochial schools enrolling 4,143,150 students and 2,356 secondary schools enrolling 1,098,756 students. Additionally, there are 308 colleges sponsored or maintained by corporations and religious orders affiliated with the Catholic Church. These have an enrollment of 433,960 students. In 1968 there were 103 protective institutions with 8,110 students; 142 special hospitals and sanitoria with a bed capacity of 11,578; and 239 child care institutions with 21,237 resident children. In that year, there were 25,188 foster homes operated in connection with Catholic charities. Agencies of the Catholic Church maintain 420 homes for the aged with 37,966 residents. Agencies of the Catholic Church in America also sponsor a number of public housing projects to which they make substantial donations.

The public welfare activities of the Catholic Church in America and its related or affiliated corporations and agencies are seeking to lend aid to Americans distressed in many different ways, related to health, welfare, poverty, education, urban housing and civil rights. Substantial amounts of money, as well as the contributed services of many thousands of religious personnel and a host of lay volunteers, will be required in order to respond adequately to the increasing tempo of these social challenges, not only in the depressed, center city sections of the major metropolitan areas of the Nation, but also in the rural and economically underdeveloped

areas of America where poverty flourishes with equal intensity.

The public welfare responsibilities conducted by the Catholic Church in the United States are matched in magnitude and scope by those carried on by the other churches. They, too, face the same challenges to the effective fulfillment of those responsibilities in today's troubled society. Any diminution, by the elimination of tax exemptions, of the capacity of all religions to respond to these challenges would be prejudicial not only to religious liberty but also to the secular general welfare.

Finally, it is USCC's specific concern in this litigation that State tax exemptions provided places of religious worship, which from the beginning of the Nation have formed a significant part of the successful American experience in religious freedom, not be unalterably prohibited by a strained and non-historical reading of the Fourteenth Amendment and of the Non-Establishment Clause of the First Amendment. The house of worship is the prime example of religious property devoted to a religious use. Its exemptibility, therefore, is the very heart and center of this case. The Court is not dealing with mere pieces of real estate or everyday buildings of commerce or industry. The Court is dealing with the pulpit, the sanctuary and the altar.

For the reasons stated below, the *amicus* supports the appellee in urging that the Court either dismiss the appeal or affirm the decision of the Court of Appeals of New York.

## QUESTIONS PRESENTED

The appellant challenges provisions of the New York Constitution and a provision of the New York Real Property Tax Law on the grounds that the tax exemptions they afford real estate owned by nonprofit religious organizations and used exclusively for religious purposes violate the religion clauses of the First Amendment, as these are incorporated in the Fourteenth Amendment. However, the *amicus* believes that there is another issue, jurisdictional in nature, which the Court should examine. This second issue, because of its nature, perhaps, was not considered by the courts below, but merits consideration in this Court.

The questions the *amicus* believes to be presented on the present record are:

1. Has the appellant properly presented a federal question on the basis of the record made in the courts below?

2. Does the tax exemption granted by Article XVI, Section 1 of the New York Constitution and Section 420, Subd. 1 of the New York Real Property Tax Law with respect to real property owned by religious organizations and used exclusively for religious purposes violate the religious guarantees of the Due Process Clause of the Fourteenth Amendment, in so far as it incorporates the Non-Establishment and Free Exercise Clauses of the First Amendment?

## SUMMARY OF ARGUMENT

### I.

The barren record out of which this appeal emerges raises the question as to whether the case is a proper vehicle for the disposition of the important issues which the appellant attempts to raise. The many substantial omissions of relevant fact, relating not only to the appellant's interest but also to the amount, nature, scope and effect of the exemptions which he challenges, argue that the instant litigation is "too fragile a foundation for indulging in constitutional adjudication." *Poe v. Ullman*, 367 U.S. 497, 501 (1961). Unless the Court is disposed to affirm the decision of the Court of Appeals of New York, the *amicus* urges that it vacate its order noting probable jurisdiction of this case and dismiss the appeal for want of a properly presented federal question.

### II.

The issue in this case is not whether the tax exemption under attack is desirable from the standpoint of legislative policy or from the perspective of one, many or all religions. The sole question for decision is whether, if a governmental body makes a considered policy judgment to exempt from taxation the property of nonprofit religious organizations used exclusively for religious purposes, as part of a general scheme of taxation in which similar exemptions are afforded the property of a great many nonprofit secular organizations, the governmental body is constitutionally forbidden to do so by the First or Fourteenth Amendments.

III.

A. In *McGowan v. Maryland*, 366 U.S. 420 (1961), this Court found "the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive." The evidence of "the place" of tax exemptions for religious property "in the First Amendment's history" is even more "enlightening and persuasive" in demonstrating that there is nothing constitutionally incompatible between such exemptions and the requirements of the First or Fourteenth Amendments. Tax exemptions for church property have been "practiced by common consent for two hundred years." *Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922). That unbroken constitutional tradition should not now be immutably prohibited by this Court.

B. The Constitution itself makes no reference to tax exemptions. Nor was there any discussion of the practice in the Constitutional Convention, in the petitions requesting enactment of the Bill of Rights, or in the debates on the Bill of Rights. However, following the adoption of the new Constitution and ratification in 1791 of the Bill of Rights, most of the original 13 States soon passed statutes or adopted constitutional provisions specifically exempting religious property from taxation. The Virginia experience is especially pertinent and demonstrates that the birthplace of modern religious liberty in America saw nothing incompatible between complete disestablishment and tax exemptions for religious property. Similarly, during the Presidency of Thomas Jefferson, Washington, D. C., the seat of the new government, adopted a taxing ordinance which exempted houses for public worship.

C. By the time of the Civil War, the great majority of the States had embodied into law, either through constitutional provisions or by statute, or both, the universal custom of granting tax exemptions for religious property. After the Civil War ended, Congress required the former States of the Confederacy, as a condition precedent for readmission to the Union, to rewrite their constitutions for Congressional approval. Significantly, in the constitutions of five of those States adopted for readmission to the Union there was specific provision, either mandatory or permissive in nature, for exemption of church properties.

In 1875, President Grant proposed a constitutional amendment, one provision of which would have ended tax exemptions for church property. Representative, later Senator, Blaine of Maine submitted a proposed constitutional amendment incorporating most of President Grant's suggestions but which did not include, however, the latter's proposal that tax exemptions for churches be eliminated. The proposed amendment never cleared the Congress. The constitutions of 10 States admitted to the Union after the adoption of the Fourteenth Amendment contained provisions limiting the use of public funds in aiding religion, but at the same time provided for some variety of tax exemption for church properties used for religious purposes. It is clear, therefore, that Congress never seriously entertained the notion that State exemption of church property from property taxes offended fundamental provisions of the Bill of Rights.

D. The catalyst which the Blaine amendment provided the States in adopting constitutional provisions which

limited the expenditure of public funds to assist religion did not induce them to eliminate the constitutional or statutory authority which sanctioned tax exemptions for ecclesiastical property. At the present time, the constitutions of thirty-six of the States contain either a mandatory or permissive provision for the exemption of property used for religious purposes. In the remainder of the States a similar exemption is provided by statute.

The Congress has also indicated its consistent endorsement of the practice of tax exemptions for religious property. Exemptions for religious institutions were provided for in the federal income tax of 1894 and have been carried over into the present Internal Revenue Code.

E. From the time the Nation began, every State and Federal legislative body that has taken the question up has come down on the side of permitting tax exemption for church properties used for religious purposes. Yet the religious tax exemptions sanctioned "during our history . . . [have] not in fact begun a series of steps toward the establishment of religion." Paulsen, *Preferment of Religious Institutions In Tax and Labor Legislation*, 14 Law & Contemp. Prob. 120, 147 (1949). Truly, in this particular area of Church-State relationships, "a page of history [has been proved to be] worth a volume of logic." *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

IV.

A. The constitutionality of permitting tax exemption for religious property has been held as constitutional by every court, State or Federal, including this Court, that has ever passed upon the issue. It is clear in this case that the accumulated force of unanimous judicial

opinion, consistently adhered to and voiced many times from colonial days to the present, constitutes a formidable basis from which to argue for the continued constitutional permissibility of tax exemptions for church properties used for worship.

B. No case has been found holding that the granting of such exemptions is contrary to State or Federal constitutional provisions regarding the support or establishment of religion, and, when the matter has been raised, the exemptions have been upheld in each instance. This was true before this Court spoke in *Everson v. Board of Education*, 330 U.S. 1 (1947); it has remained true following that important decision. While the precise rationales upon which the courts have unanimously arrived at the same conclusion concerning the constitutionality of tax exemptions for church property have varied in particular cases, the point is that every State and Federal court that has dealt with the issue from 1791 to the present has upheld the constitutionality of religious tax exemptions.

C. Prior to its decision in *Everson v. Board of Education*, this Court had only one opportunity to pass upon the religious tax exemption within the context of the First Amendment, acknowledging in *dicta* in that case that Congress had the power to exempt church buildings and grounds from real estate taxes. *Gibbons v. District of Columbia*, 116 U.S. 404, 408 (1886). During the pre-*Everson* period the Court several times pointed to the exemption of church property as an illustration of a permissible legislative power to classify for purposes of taxation without violating the Equal Protection Clause of the Fourteenth Amendment. *Bell's Gap Ry. Co. v. Pennsylvania*, 134 U.S. 232, 237 (1890).

Following the *Everson* case, this Court has had three prior opportunities to decide the very issue raised on the instant appeal. In two instances the Court upheld the exemption on the merits. *Lundberg v. County of Alameda*, 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom., Heisey v. County of Alameda* 352 U.S. 921 (1956); *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962). In *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966), the Court denied a petition for *certiorari* seeking review of a decision of the Court of Appeals of Maryland upholding tax exemption for structures used exclusively for public worship.

The unanimous action of all courts which have considered the issue in upholding exemptions for church property serves to distinguish the practice from other types of Church-State involvements in which certain governmental policies have been upheld in some cases and struck down in others. Moreover, unlike the background preceding this Court's comparatively recent landmark decisions in the areas of civil rights and reapportionment, there is not only present here a long continued, completely consistent history and unbroken chain of judicial precedents, but there is also absent any compelling demand of the existing social order for the vindication of fundamental constitutional rights, such as existed in those historic cases.

V.

Solidly grounded in legislative history and judicial precedent, religious tax exemptions also draw firm constitutional support from a diversified array of Church-

State decisions by this Court. In interpreting the religious guarantees of the First and Fourteenth Amendments, the Court has demonstrated a perennial concern to restrict the government to secular activities and to protect the religious freedom of individuals and institutions. The New York type of exemption makes an enormous contribution precisely to the secularity of government and to the religious liberty of all citizens and organizations.

Appellant argues that the "no aid" language of the *Everson* case, 330 U.S. 1, 15-16 (1947), invalidates religious property tax exemptions. Appellant's argument, however, takes no cognizance of the rest of the *Everson* opinion, of the decision actually reached in the *Everson* case, or of the other Church-State decisions by this Court. Appellant has attempted what the Court never intended: the substitution of the "no aid" language for the religious guarantees of the First and Fourteenth Amendment.

VI.

*Everson* was decided in 1947; *School District of Abington Township v. Schempp*, 374 U.S. 203, was decided in 1963. In *Schempp*, the Court repeated the "no aid" language of *Everson* and interpreted it as meaning that "to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion." 374 U.S. at 222.

A. Measured by the *Schempp* test, the New York type of exemption at issue in this case fully satisfies the requirements of the Establishment Clause. In applying the test, two types of religious organizations must be

distinguished: those that are exclusively concerned with divine worship, and those that also engage in "service activities," such as caring for the sick and the poor. Exemption of the second class of religious organizations has the same secular purpose and effect as exemption of nonprofit secular organizations that engage in the same activities. If this class of religious organizations were not given the same exemption treatment as its secular counterpart, there would be a serious constitutional issue of discrimination against religion.

With respect to religious organizations of the first class (those engaged exclusively in divine worship), New York intends and achieves at least three secular effects: (1) fostering the objectives of the separation of Church and State; (2) abstention from a chilling fiscal effect on private nonprofit organizations engaged in activities outside the government's authority; and (3) the sound exercise of legislative discretion in choosing economically suitable subjects for taxation.

B. Although the New York exemption fully satisfies the *Schempp* test, there are reasons to doubt that this Court intended *Schempp* to apply in a literal way to the area of the constitutionality of religious exemptions from general secular laws. In granting such exemptions, the State and Federal governments are dealing with religion as such. While the First and Fourteenth Amendments severely limit the competence of government in the field of religion, there are areas, such as the settlement of church property disputes and apportioning the incidence of taxation, where government must act in a way that substantially affects religious interests. In certain areas of unavoidable and substantial contacts

between religion and government, the *Schempp* requirement of a "secular purpose and primary secular effect" does not provide a distinct guideline. Other constitutional criteria of greater applicability can clearly be found in this Court's decisions precisely in the area of religious exemptions from general secular laws.

VII.

To be properly evaluated, religious exemptions must be viewed within the context of the many facets of American Church-State policy. One of the most striking features of that policy is that, with respect to houses of worship, the States have uniformly followed a positive policy on *exemptions* and a negative policy on *grants*. The "symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church." Freund, *Aid to Parochial Schools*, 82 Harv. L. Rev. 1687, n. 16 (1969). In addition to this basic symbolism, the dual policy of the States is based on the fundamentally different political and financial effects of exemptions and grants, and is fully conformed to the dual constitutional guarantees of No Establishment and Free Exercise.

In approaching a modern constitutional analysis of religious tax exemptions of the New York type, the Court will find valuable guidance in its earlier decisions in *Jones v. Opelika*, 316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); and *Follett v. Town of McCormick*, 321 U.S. 573 (1944). These three cases fully establish the doctrine that government cannot

impose license taxes on religious activities, because such taxes operate as a prior restraint on First Amendment guarantees and could lead to a crushing financial burden on the free exercise of religion.

*Jones, Murdock* and *Follett* did not, of course, settle the precise issue before the Court in this case: the permissibility of exempting houses of worship from property taxes. Neither, however, did *Jones, Murdock* and *Follett* raise any question about the propriety of such exemptions.

It is also significant that in a number of other recent decisions, not concerned with taxation, this Court has not hesitated to recognize that the First and Fourteenth Amendments support, and sometimes even require, religious exemptions from general secular laws. In *Board of Education v. Barnette,* 319 U.S. 642 (1943), the Court held that the children of Jehovah's Witnesses had to be exempted from saluting the flag as part of their public school activities. In *Zorach v. Clauson,* 343 U.S. 306 (1952), the Court sustained a statute permitting students to be excused from part of their regular public school attendance in order to attend religious instruction classes. In the *Sunday Closing Law Cases,* 366 U.S. 420, 582, 599, 617 (1961), the Court stated that religious exemptions might be the wiser course, but that they were not mandatory. One year later, in *Arlan's Dept. Store v. Kentucky,* 371 U.S. 218 (1962), the Court dismissed, for want of a substantial federal question, an appeal against a Sunday closing law that specifically exempted from its penal provisions those who worship on a different day than Sunday. In *Sherbert v. Verner,* 374 U.S. 398 (1963), South Carolina was

compelled to exempt a Seventh Day Adventist from one of the provisions of its unemployment compensation laws. Indeed, although *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963), held that governmental sponsorship of religious exercises in the public schools was inherently unconstitutional and therefore could not be saved by exemption provisions for dissenters, there is no case in which this Court has ever held a religious exemption from a general secular law unconstitutional.

It is clear from this survey of the Court's recent Church-State decisions that religious exemptions are not inherently suspect. Quite to the contrary, they are an extremely important part of the American heritage of religious liberty.

With particular reference to the New York type of property tax exemption, there are two fundamental constitutional values that justify the permissibility of the legislative policy: maximizing the fiscal separation of Church and State, and minimizing State interference with the free exercise of religion.

If the States were compelled to tax houses of worship, they would have to assess their secular value and enforce collection of the tax. Moreover, the smaller and poorer churches, especially those in rural areas and center-city locations, might well find the burden of taxation extremely onerous.

In the last analysis, appellant's challenge to the New York type of exemption is not based on constitutional arguments, but on the supposed "burden" that the exemption places on him and on the conflict between appellant's conscience and the legislative policy. The Constitution, however, does not require that every piece

of property be taxed, just as it does not guarantee that every taxpayer will be taxed equally. The benefits to society at large from the policy of exempting houses of worship, in common with a wide variety of other private, voluntary, nonprofit organizations, from the property tax more than justify whatever burdens result to the subjects that the legislature has chosen for taxation.

From the very beginning, we have sought to accommodate our laws so that every citizen could live in as much harmony as possible with his conscience and his government. In a Nation as religiously diverse as our own, however, it is not possible to give every citizen's conscience a right of veto over important public policies. Appellant demonstrates no constitutional injury merely by asserting that he is in conscientious disagreement with the government.

History, judicial precedent, and current constitutional analysis combine to support tax exemptions of the New York type as a rationally conceived and deep-seated policy. Appellant has provided no basis for this Court to declare that policy unconstitutional.

## VIII.

Constitutional considerations apart, the taxation of houses of worship would produce practical consequences that would have a significantly adverse impact upon the State, the Church and society as a whole.

A. If the States are held to be barred on constitutional grounds from permitting tax exemption for houses of worship, there will be no net financial gain, but perhaps a loss, to the State, and there also will

ensue a substantial curtailment of valuable public benefit services conducted by the agencies of religious organizations, a slack which the State will have to take up itself.

Critics have assigned financial reasons in urging that the practice of voluntary tax exemptions for church properties be discontinued. However, it "is very difficult to make out a convincing factual case for eliminating religious tax exemptions . . . on the basis of the existing data." Paulsen, *supra.* So far as New York City is concerned, the statistics show that the total amount of religious property which is tax exempt in that city represents only 4.9% of the total tax exempt property and that, for example, exemptions for federally aided public housing alone in New York City exceeded the religious property exemption by $13 million.

In addition to financial considerations, significant burdens would be thrown upon the State, if, as a result of the elimination of tax exemptions, the churches and their affiliated institutions were forced to reduce the public benefit activity which they now conduct. *Murray v. Comptroller of the Treasury*, 241 Md. 383, 401, 216 A.2d 897, 907 (1966), *cert. den.* 385 U.S. 816 (1966).

"The exemption of property from taxation is a question of policy and not of power." *State of Ohio v. Knopp*, 57 U.S. 369, 384 (1853). It cannot be fairly maintained, therefore, that the exemptions challenged in this litigation have no reasonable relationship to the achievement and protection of legitimate secular concerns of the State.

B. It is also self evident that, if church properties must be taxed, there will have to be some retrenchment in activities conducted by the churches in order to bear the increased economic burden thus thrust upon them. Undoubtedly, curtailment of social welfare services currently performed by the churches will result. To the extent that a church must reduce the scope and tempo of its good works, it is *pro tanto* less a "religious" organization that it was before.

C. Tax exemptions have played an important part in keeping the complex social structure of our Country in balance. Repudiation by the Court of this longstanding, most deliberate and most cherished tax exemption would inevitably weaken that structure and cannot be justified on the basis of any compelling constitutional reasons advanced in this case.

## ARGUMENT

### I

### The Constitutional Issue Has Not Been Properly Presented

There are compelling reasons supporting the correctness of the decision challenged on this appeal. But whatever may be the Court's views on the merits of the case, there can be no dispute about the magnitude of the constitutional issues which the appellant has attempted to raise. Because of the importance of those issues, the *amicus* respectfully suggests that this Court first consider whether, in the light of the extremely barren record made in the courts below, this case is truly a proper vehicle for their disposition at this time, especially in view of the far-reaching consequences which will follow a decision on the merits.

The Court often has admonished that it will not decide important constitutional questions, however appealing, on the basis of an inadequate or amorphous record.[1] Very recently, four members of this Court declined an opportunity in *Powell v. Texas*[2] to determine that the Cruel and Unusual Punishment Clause of the Eighth Amendment, as now incorporated in the Fourteenth Amendment, barred conviction of a chronic alcoholic for the crime of public drunkenness. As in *Powell, supra,* the record in the present case "is utterly inade-

[1] *Ellis v. Dixon,* 349 U.S. 458, 462 (1955) (record inadequate to support a determination of claims that rights of speech, assembly and equal protection of the laws were denied by state action); *Wolfe v. North Carolina,* 364 U.S. 177, 194 (1960) (claim of racial discrimination on the part of a state agency declined).

[2] 392 U.S. 514, 521 (1968).

quate to permit the sort of informed and responsible adjudication which alone can support the announcement of an important and wide-ranging new constitutional principle."[3]

A reading of the abbreviated appendix filed in this Court reveals the sparseness of the record brought here. It also shows that the plaintiff filed a 2½ page brief in the New York Court of Appeals (A. 38). In this Court, appellant's brief on the merits reaches 8 pages. The section devoted to argument consists primarily of 2½ pages of quotations, without discussion, from the Court's opinion in *Everson v. Board of Education*, 330 U.S. 1 (1947).[4]

More importantly, there is no evidence in this record concerning the amount of church-held real estate ex-

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[3]*Id.* at 521.

[4]Missing from the record are any facts as to: the size and nature of the property owned by the plaintiff; its assessed valuation; the tax paid on it; when he acquired it; and his purpose in acquiring it. The record also is devoid of evidence that appellant's real estate taxes have been, are being, or will be, increased because of the existence of the particular exemptions challenged in his suit. In this connection the New York Times reports that the appellant's property has an assessed valuation of $100, is taxed at $5.24 a year by the City of New York, and was purchased by Mr. Walz for $25 in June 1967, the month he initiated the suit which is now before this Court on appeal. New York Times, June 20, 1969, pp. 1, 35. The record indicates that the deed of purchase was executed on May 20, 1967 (A. 15) and was recorded on June 19, 1967 (A. 16), five days after plaintiff filed his action in the New York Supreme Court (A. 4). The Times report, of course, may or may not be accurate. The point is simply that in these respects, as well as in the others stated above, the record is barren.

empted from taxation in New York City and in New York State by virtue of the constitutional and statutory provisions challenged in this litigation; the value of such church property and its relationship to the total of assessed valuation of real property subject to taxation; the relationship of exempted church property to the total of real property exempted; the financial impact on churches if houses of worship are to be taxed on the same basis as other real estate; and the nature and variety of, and the costs of maintaining, the social welfare, education, charity, hospital and medical assistance, and other related public welfare activities carried on by the church organizations whose real estate is exempted by virtue of the provisions of New York law involved in this litigation.

The appellant's standing to bring his suit is not challenged.[5] However, the extremely skimpy record, the paucity of legal analysis or argument offered on behalf of the appellant, and the absence of allegation or proof that his own taxes would actually be lower if exemptions were abolished combine to suggest that on the merits the appellant has not demonstrated that the tax exemption practices of New York City adversely affect in any way his own constitutional rights. *Flast v. Cohen* undoubtedly means that taxpayers have the right to raise constitutional questions about the validity of tax laws under the Establishment Clause. *Flast*, however, does not mean that every taxpayer will win every case he brings, or that every taxpayer properly makes out his case merely by proving that he is a taxpayer. The appellant has introduced no evidence whatever of personal or public hurt.

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[5]Cf. *Flast v. Cohen*, 392 U.S. 83 (1968).

He has not even attempted to show that he is constrained in the exercise of his own religion, or that the tax exemption costs the State more than the State gains from the welfare services (as distinguished from worship and preaching) rendered to the public by religious organizations. Compare Bittker, *The Case of the Fictitious Taxpayer: The Federal Taxpayer's Suit Twenty Years After Flast v. Cohen*, 36 U. Chi. L. Rev. 364 (1969), with Davis, *The Case of the Real Taxpayer: A Reply To Professor Bittker*, 36 U. Chi. L. Rev. 375 (1969).

Certainly, the important issue which the appellant asks the Court to decide merits a more illuminating record than the one out of which this appeal emerges. That record "hardly reflects the sharp legal and evidentiary clash between fully prepared adversary litigants which is traditionally expected in major constitutional cases." *Powell v. Texas, supra*, at 522. As in *Kimbrough v. United States*, 364 U.S. 661, it can be fairly said that despite this Court's notation of probable jurisdiction, "a more thorough consideration of the record than . . . [may have been previously afforded] . . ." might justify the conclusion that the highly important and complex constitutional question which appellant presses upon the Court—both in terms of its enormous economic, political and social impact and its significance in the orderly development of constitutional doctrine in the State-Church field—"is not presented with sufficient clarity in this case."

The substantial omissions from the record strongly suggest that the context of this litigation and the record on which it rests are "too fragile a foundation for indulging in constitutional adjudication." *Poe v. Ullman*, 367

U.S. 497, 501 (1961). The nature and importance of the constitutional issues which the Court is called upon to take up in this case deserve, we believe, a firmer adjudicatory base from which to proceed to their ultimate disposition and the possible wide-ranging consequences which might flow from that disposition. "The best teaching of this Court's experience admonishes us not to entertain constitutional questions in advance of the strictest necessity." *Parker v. County of Los Angeles*, 338 U.S. 327, 333 (1949); *Poe v. Ullman, supra* at 503.

For these reasons, unless the Court is disposed to follow the unbroken precedent of history and of all the courts, including this Court, and affirm the decision of the Court of Appeals of New York, we urge that the Court vacate its order of June 16, 1969 noting probable jurisdiction in this case and grant appellee's earlier motion to dismiss the appeal for want of a properly presented federal question.

## II.

## The Precise Constitutional Issue To Be Decided

This case presents an important but narrow issue. The question is whether the Fourteenth Amendment prohibits the people of a State, or a State legislature, from choosing to exempt from taxes "real property owned by a corporation or association organized exclusively for . . . religious . . . purposes . . . and used exclusively" for such purposes.[6] At the outset, it is important to stress that the issue is not one of whether the tax exemption in

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[6]N. Y. Const., Art. 16, Sec. 1; Sec. 420, Subd. 1, Real Property Tax Law of New York.

faced with determining the validity of the income and estate tax deductions permitted those who contribute or donate money or property to religious organizations. The precise issue presented in this case, however, undoubtedly does bear upon, and could well determine, the constitutionality of all exemptions voluntarily granted religious organizations from various income, sales, estate, excise taxes and the like.

In summary, the issue is the constitutionality of a legislatively afforded exemption (a) of property owned by a nonprofit religious organization, (b) used exclusively for religious purposes, (c) common to all religious organizations, and (d) shared with a great number of other nonprofit, charitable and educational organizations. In particular, the issue concerns whether a State may, if it so wishes, exempt houses of religious worship from the general real property tax.

## III.

## America's Undeviating Historical Policy and Practice Of Exempting Religious Property from Taxation.

A. *The Important Place of History in Constitutional Adjudication.* The *amicus* believes that the unswerving historical acceptance of the legality and propriety of real property tax exemptions for church properties in this Country since its formation in 1787 up to the present

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*amicus* does not defend exemptions from taxation accorded church properties used or operated for commercial purposes and has so advised the Congress and the public. Joint Statement of the National Council of Churches and the United States Catholic Conference, *Hearings on H.R. 13270 (The Tax Reform Act of 1969)* before the Senate Committee on Finance, 91st Cong., 1st Sess., 83 (May 2, 1969) (unofficial print).

time constitutes an unusually compelling argument in support of the constitutionality of such exemptions. Their long-continued existence and universal acceptance, unlike virtually any practice the constitutionality of which has been reviewed by this Court, is a classic illustration of Mr. Justice Holmes' famous observation that: "The life of the law has not been logic; it has been experience."[9] And so it is with great constitutional provisions. In *McGowan v. Maryland*,[10] this Court found "the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive."[11] The evidence "of the place" of tax exemptions for religious property "in the First Amendment's history" is, we believe, even more "enlightening and persuasive" in demonstrating that there is nothing constitutionally incompatible between tax exemption and the requirements of that great Amendment. It is undoubtedly true that a constitutional question should not be regarded as settled until it is settled right, as Mr. Justice Brandeis once put it. Nevertheless, equal wisdom is reflected in the statement of his famous colleague, Mr. Justice Holmes, that: "If a thing has been practiced by common consent for two hundred years, it will need a strong case for the Fourteenth Amendment to affect it."[12] As we now show, tax exemptions for church property have been "practiced by common consent for

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[9]Holmes, The Common Law 1 (1945).

[10]366 U.S. 420 (1961).

[11]366 U.S. at 440; see also *Reynolds v. United States*, 98 U.S. 145, 165 (1878).

[12]*Jackman v. Rosenbaum Co.*, 260 U.S. 22, 31 (1922).

two hundred years." The indisputable historical fact is that from the time of the formation of the Republic the Federal and State governments have chosen to afford houses of religious worship exemption from property taxation. That unbroken constitutional tradition should ~~now~~ Not be immutably prohibited by this Court.

B. *Religious Tax Exemptions Existed in the Earliest Days of the Nation.* We begin the story by examining the practices prevailing in the original States at the time the Constitution was adopted in 1789. In point of fact, however, the American practice of exempting religious property existed in colonial days, a time when the established churches were regarded as agencies of the state or town.[13] There is historical evidence that, even in the days when the established church was considered as an instrument or agency of government, houses of worship maintained by other churches which were not part of the establishment were also, by practice, not taxed.[14] Nevertheless, the *amicus* takes as its starting point in setting

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[13]Pfeffer, Church, State and Freedom 183 (1953). As the author of that work notes: "Tax exemption of church property is probably as ancient as taxation itself . . . [and] dates back at least to early Biblical days." See also Antieau, Carroll and Burke, Religion Under the State Constitutions 121 (1965), and 3 Stokes, Church and State In the United States 418 (1950).

[14]Stimson, *The Development of Tax Exemption In South Carolina,* 4 S.C.L.Q. 396, 400 (1952); Van Alstyne, *Tax Exemptions of Church Property,* 20 Ohio St. L.J. 461, 462 (1959). As a Connecticut court once said, the principle of exempting the property of religious institutions "has been inseparably interwoven with the structure of government and the habits of our people, since 1638. . . ." *Yale v. Town of New Haven,* 71 Conn. 316, 332, 42 A. 87, 92 (1899).

out the history of religious tax exemptions in the United States the adoption of the Constitution and the ratification of the First Amendment in 1791, for it is the Constitution and specifically the religion clauses of that Amendment from which this Court must draw its answer to the issue which appellant urges upon it for decision.

The Constitution itself, while conferring the broadest powers of taxation on the Congress, does not refer to tax exemptions. Nor was there any discussion of the practice in the Constitutional Convention, in the petitions requesting enactment of the Bill of Rights, or in the debates on the Bill of Rights.[15] Similarly, the debates in the State conventions preceding ratification of the Constitution produced no informative discussion regarding tax exemptions of church properties.

Following the adoption of the new Constitution and ratification in 1791 of the Bill of Rights, most of the original 13 States soon passed statutes or adopted constitutional provisions specifically exempting religious property from taxation.[16] These statutory exemptions followed a general pattern and collectively establish the early origins of State exemptions in this area during a period of time following close upon the adoption of the

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[15] Antieau, Carroll and Burke, *supra* note 13, at 122; Zollman, *Tax Exemptions of American Church Property*, 14 Mich. L.Rev. 646 (1916); O'Brien, *Government and Religion*, 5 Vill. L.Rev. 335, 347 (1960).

[16] The early tax exemption statutes adopted in the original 13 States are set out in Appendix A of the Supplement filed with this brief.

First Amendment. The early history of the New York policy in affording the real property exemption is discussed in the briefs filed by the appellee and the State of New York as *amicus curiae.* However, to support the point in more detail, the *amicus* in this brief has singled out for fuller treatment the origins and developments of tax exemption for religious property in four other representative States of the original thirteen. These are Virginia, Massachusetts, Maryland and South Carolina.[17] To them we have added the early Federal experience in the newly created seat of the Government, the District of Columbia.

1. *Virginia.* This Court is most familiar with the fact that direct antecedents of the First Amendment may be traced to the early Virginia experience in forging the foundations of religious liberty in that State, especially the part played in that effort by Thomas Jefferson and James Madison.[18] The Virginia experience with religious

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[17]In Massachusetts as in the other New England states, the local congregation was the basic church, whereas in Virginia, Maryland and the Southern States, the parent church or upper hierarchical body was usually considered the basic religious entity. Note, *Judicial Intervention In Church Property Disputes–Some Constitutional Considerations,* 74 Yale L.J. 1113, 1115 (1965). Despite the difference in official attitude regarding who or what was really the church, all of the original States early provided tax exemptions for church property, whatever body had formal title to, or was entitled to prescribe the use of, church property. See Appendix A in the Supplement accompanying the brief of this *amicus.*

[18]*McGowan v. Maryland,* 366 U.S. 420, 437-440 (1961); *Everson v. Board of Education,* 330 U.S. 1, 33-41 (1947) (Rutledge, J. *dissenting*).

tax exemptions is, therefore, especially pertinent in construing the reach, if any, that the First Amendment, through the Fourteenth, may have to such exemptions.

The Virginia story is clear and persuasive. In January of 1786, the Virginia General Assembly, largely under the leadership of James Madison, then one of its distinguished members, adopted a bill, originally drafted by Thomas Jefferson, entitled "An Act For Establishing Religious Freedom".[19] The part which Madison played in that effort, as well as his concomitant exertions in the struggle against the Assessment Bill, which collapsed in committee in December 1785, are set out in detail in Mr. Justice Rutledge's dissenting opinion in *Everson, supra.* The sweep of the historic Bill For Establishing Religious Freedom, authored by Jefferson, sponsored by Madison, and adopted by the Virginia General Assembly in 1786, forbade the establishment of religion and secured its free exercise in Virginia.

Yet, even with the passage of the Bill For Establishing Religious Freedom and the defeat of the Assessment Bill, the fight was not completely over in Virginia. A number of statutes remained on the books, dating back to colonial days in most cases, which by inference or reference recognized the Church of England as an "established church". A statute to eliminate these vestigial statutory provisions was adopted by the Virginia General Assembly on January 24, 1799. The statute was entitled "An Act To Repeal Certain Acts and To Declare the Construction of the Bill of Rights and Constitution Concerning Religion".[20] Its purpose clearly was the final

[19]Hennings, Virginia Statutes At Large 84-86 (1785-1786).

[20]Virginia Statutes At Large, Shepherd's Continuation of Henning 149 (1796-1803).

elimination of all the remaining vestiges of religious establishment in Virginia.

Prior to 1800, the taxing statutes of Virginia had not exempted any classes of property from tax liability. However, on January 23, 1800, with James Madison again sitting as a leading member of the Virginia General Assembly,[21] that body enacted a taxing statute which included the following provision:

> "Provided, That no taxes shall be collected on lands, lots, or other properties belonging to this Commonwealth or to any county, town, *houses for divine worship*, or seminary of learning." (Italics supplied).[22]

Thus, almost a year to the day when Virginia had completed its final mopping up operations in the fight for disestablishment, it saw fit to exempt houses of religious worship from taxation. The birthplace of modern religious liberty in America apparently saw nothing incompatible between complete disestablishment and tax exemptions for religious properties.

A final note might be added to the Virginia story. That Commonwealth has always been one of the States most strict in maintaining the separation of Church and State. For example, a provision of its constitution to this

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[21] Swem and Williams, *A Register of the General Assembly of Virginia, 1776-1918*, 53 (Richmond, 1918). Madison was excused from further attendance at the 1800 session of the House of Delegates after January 22, 1800. However, the statute in question passed the House on January 20, 1800; Journal of the House of Delegates of the Commonwealth of Virginia 75, 98 (1799-1800).

[22] Virginia Statutes At Large, Shepherd's Continuation of Henning 200 (1796-1803).

day prohibits the incorporation of religious societies.[23] However, that same constitution continues the tradition of tax exemption for religious property which had its statutory origins in 1800.[24]

2. *Massachusetts.* Massachusetts was one of the first of the original States to embody authorization for tax exemption for churches within its Constitution. This it did in 1780. The original language has been retained in subsequent amendments and revisions of the Constitution.[25]

The phraseology is somewhat antiquated. The legislature is directed "in all future periods" of the Commonwealth "to cherish literature, sciences and other forms of learning and all seminaries of them." Further, the future legislators were implored to "encourage" both private societies and public institutions which had as their objectives an inculcation of the virtues of "humanity and general benevolence . . . charity, industry, and frugality, honesty and generous sentiments among the people."

Pursuant to this constitutional directive, which has not been changed in substance since 1780, the legis-

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[23]Va. Const., Sec. 59.

[24]*Ibid,* Sec. 183(e). Moreover, the Supreme Court of Virginia has construed the exemptions accorded church properties liberally, holding, for example, as to such property, in contrast to other types of exemptions, that "exemption is the rule and taxation the exception" under "the policy of the State. . . ." *Commonwealth v. Lynchburg Y.M.C.A.*, 115 Va. 745, 747, 80 S.E. 589, 590 (1914).

[25]Mass. Const. (rearranged in 1919 with amendments), Chap. 5, Sec. 2 (1780). See p. 20 of the Supplement filed with this brief.

lature of Massachusetts has provided that certain classes of property used by churches, schools and charity be exempt. "Houses of worship" are exempt along with the pews and other furnishings.[26]

The history of this exemption in Massachusetts is well set forth in Judge Barker's dissenting opinion in *All Saints Parish v. Brookline,* 178 Mass. 404, 59 N.E. 1003 (1901).[27]

> "For a period of 216 years the doctrine that the churchyard and the church were public works was of itself sufficient to secure for them an unbroken exemption from taxation. Until April 1, 1836, there was no statutory exemption of land or building. Yet neither were taxed and for the same reason which, without any statutory declarations to this day has exempted courthouses, jails, houses of correction, schoolhouses and townhouses and city halls, with their grounds, and also highways, canals, and lands and structures within the location of railroads. The only statutory provisions relating, though remotely to the subject, were those which from the year 1799 exempted from taxation, except for parochial purposes, pews and houses of public worship, although the pews were the private property of individuals, which they could lease, mortgage, sell and convey or devise by will at their pleasure, and which could be taken by legal process for the debts of the individual owner."[28]

Continuing, Judge Barker stated, "The revised Statutes for the first time made a statutory provision exempting

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[26]Mass. Code L. A., Ch. 59, Sec. 5, Cl. 11.

[27]The dissent related only to the coverage of the exemption in that case; there was no disagreement regarding its legality.

[28]178 Mass. at 412, 59 N.E. at 1005.

houses of religious worship from taxation. Rev. St. C. 7, Article 5, Cl. 5."[29] He then proceeds to trace the statutory development of the exemption laws for houses of religious worship. These references and the subsequent history of the statutory provisions pertaining to exemptions only reinforce the unbroken nature of the basic exemption accorded to houses of worship.

In general, the exemption accorded houses of worship has been considered to be an outgrowth of achieving the lofty aims set forth in the constitutional language which, in effect, is a mandate to the legislature of the state of Massachusetts. As eminent commentators have noted: "One means the framers of this language obviously had in mind by way of achieving these lofty aims was to *excuse* them, whenever possible, from the burden of taxation."[30] [Italics supplied]

3. *Maryland.* George Calvert founded the colony of Maryland in 1632 in reaction to the widespread religious persecutions in England. Thus, Calvert had as a fundamental principle the theory that government should be truly tolerant of the religious views of its subjects.

Maryland's first Constitution was adopted in 1776, thirteen years before the effective date of the Federal Constitution and fifteen years before the Bill of Rights. The 1776 Maryland Constitution included a Declaration of Rights which contained in Article 33 (now Article 36) the following:

> ". . . wherefore no person ought by any law to be molested in his person or estate on account

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[29] *Ibid.*

[30] Antieau, Carroll and Burke, *supra* note 13, at 126.

> of his religious persuasion or profession, or for his religious practice; . . . nor ought any person to [*sic*] be compelled to frequent or maintain or contribute, unless on contract, to maintain any particular place of worship or any particular ministry;"

Article 34 of the Declaration of Rights (now Article 38) then said:

> "That every gift, sale or devise of land to any Minister, Public Teacher or Preacher of the Gospel, as such, or to any Religious Sect, Order or Denomination, . . . without the leave of the Legislature, shall be void;"

Twenty-two years later, the first *ad valorem* property tax statute was enacted. On January 20, 1798, the Maryland General Assembly passed a bill entitled "An Act for the valuation of real and personal property within this State." That statute began with the following provision:

> "All real and personal property in this state, except property belonging to this state, or the United States, *houses for public worship*, burying-grounds, or property belonging to any county, or to any college, or to any county school . . . shall be valued . . . and shall be chargeable according to such valuation with the public assessment." [Italics supplied] [31]

It is apparent, therefore, that the Maryland General Assembly of 1797 saw no inconsistency between the exemption of "houses for public worship" and the disestablishment provisions of Article 33 or the mortmain provision of Article 34 of the Declaration of Rights contained in Maryland's Constitution of 1776, then in effect.

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[31] Laws of 1797, Ch. 89, Kilty's Laws of Maryland (1785-1799).

Maryland has continuously retained the exemption for houses of public worship in its tax law since 1798.[32] In 1966, the constitutional validity of Maryland's 170-year-old exemption was sustained by the Maryland Court of Appeals.[33] In that year, the same Court adopted a most restrictive interpretation of the First Amendment in a case concerning state aid to church-related educational institutions.[34]

4. *South Carolina.* An examination of the early practices and statutes of South Carolina indicates that the Episcopal Church, being the state or established church of the Colony, was considered to be a public institution and serves to explain the tax exempt status which the Episcopal Church enjoyed along with other public institutions. An Act of 1704 provided for the construction of church buildings for each of the ten parishes in which the Colony was divided. The public treasury bore the cost over and above donations; a specified sum was provided for ministerial salaries.[35]

In 1739, the Colonial Legislature passed the first statutory provision for the exemption of church property other than that of the established church. The applicable portion of the statute reads:

> ". . . lands whereon any churches or other buildings for divine worship or for free schools are

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[32] Article 81, Sec. 9(4), Ann. Code of Maryland (1965).

[33] *Murray v. Comptroller*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.*, 385 U.S. 816 (1966).

[34] *Horace Mann League v. Board of Public Works*, 242 Md. 645, 220 A.2d 551 (1966), *cert. den.*, 385 U.S. 97 (1966).

[35] 2 S.C. Stat. at L. 236-246.

> erected or built and lands appurtenant to such churches and buildings and free schools. . . ."[36]

One commentator has observed in discussing this exemption:

> "In granting this favor to churches and free schools, the Colonists were expressing the traditional belief that public services were performed by such institutions and their work should be encouraged. An established church being is existence whose function must have been considered properly governmental, it is easy to understand the attitude that other churches also were performing governmental functions and should not be taxed."[37]

A parallel development was the provision in the Revenue Law of 1760, which taxed "all profits of all faculties, professions (clergy excepted), factorage and handicraft trades." Stimson observes that the exemption was a means of increasing the real salaries of clergymen without directly dipping into the public Treasury.[38]

With the advent of statehood, the established church was done away with and the "Christian Protestant Religion" was declared to be the established religion of the state.

The Constitution of 1790 sought to put all churches on an even footing, except that the Episcopal Church retained the property that had been given it by the public while it had been the established church. That same constitution continued the rights and privileges

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[36] *Id.*, at 255-256.

[37] Stimson, *The Development of Tax Exemption in South Carolina*, 4 S.C.L.Q. 396, 400 (1952).

[38] *Ibid.*

(including tax exemption) of churches, religious societies and educational institutions as if "this Constitution had not been altered."[39]

5. *District of Columbia.* Another relevant chapter in the history of tax exemptions during the days of the Country's beginnings is furnished by the District of Columbia. On October 6, 1802, when Thomas Jefferson was President of the United States, the City Council of the District of Columbia adopted a taxing ordinance which, however, exempted, *inter alia,* "houses for public worship."[40] In 1804, with Thomas Jefferson still the President, Congress amended the original Act under which the City of Washington had been incorporated and permitted the exemption to remain.[41] The approval of tax exemptions for church properties within a decade of the ratification of the First Amendment and, unlike the several States, within a territory which was subject to its restrictions and during the Presidential tenure of Thomas Jefferson, warrants the inference that the early City Fathers, as well as the early Congresses, perceived no conflict between a tax exemption for "houses for public worship" and the requirements of the First Amendment.

C. *The Tradition of Religious Tax Exemptions Was Continued In the Civil War Period and Afterwards.* By the time of the Civil War, most of the States had embodied into law, either through constitutional provision

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[39] S.C. Const., Art. VIII, Sec. 2 (1790).

[40] Act of October 6, 1802, Bothwell's Compilations of Laws of Washington (1833).

[41] Act of February 24, 1804, Ch. 142, Sec. 254.

or by statute, or both, the universal practices of granting tax exemptions for religious property and of restricting direct grants to religious institutions. During these years when the Congress imposed direct taxes (beginning with the Act of July 14, 1798), it also uniformly exempted properties which were exempt by State law. This followed an earlier suggestion of Alexander Hamilton.[42] Congress was quite aware of the terms and scope of the various State tax exemptions prior to the passage of federal tax acts, since the Secretary of the Treasury in 1796 filed with Congress a report containing a compendium of the tax laws of each State, including the exemptions then in effect.[43]

After the Civil War had ended, Congress required the Southern States, as a condition precedent for re-entry to the Union, to rewrite their constitutions and submit them for its scrutiny and approval.[44] While nothing was said of tax exemptions for religious property during the Congressional debates on the Fourteenth Amendment, the same Reconstruction Congresses which had initiated, drafted, debated and approved that Amendment by 1870 had approved all of the redrawn constitutions of the former States of the Confederacy. It is significant that in the constitutions of five of these States there was specific provision, either mandatory

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[42] *The Federalist*, No. 36 (Hamilton).

[43] 1 American State Papers (Finance) 414 (1858).

[44] Act of March 2, 1867, 14 Stat. 429; Act of June 25, 1868, 15 Stat. 73; see also Remarks of Thaddeus Stevens, Congressional Globe, 49th Cong., 2d Sess., 2465 (1867).

or permissive in nature, for exemption of church properties.[45]

In the decade beginning 1870, the Liberal League initiated a movement to eliminate the exemptions afforded religious property.[46] This movement apparently reached its high water mark in 1875. In that year, President Grant in his State of the Union message to the Congress suggested a constitutional amendment to declare State and Church "forever separate and distinct . . . and that all church property . . . bear its own proportion of taxation."[47] One week later, Representative Blaine of Maine submitted a proposed constitutional amendment incorporating most of the propositions suggested to the Congress in President Grant's State of the Union message. He did not, however, include President Grant's proposal that tax exemptions for churches be eliminated.[48] In view of Representative, later Senator, Blaine's acknowledged views in favor of the strictest separation of State and Church, the silence of his amendment on the point has special significance. It is clear that the leaders of that day held the firm belief that nothing in the Constitution prohibited religious tax exemption.

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[45] Ark. Const., Art. X, Sec. 2 (1868); N. C. Const., Art. V, Sec. 5 (1868); S. C. Const., Art. IX, Sec. 1 (1868); La. Const., Art. 118 (1868); Fla. Const., Art. XIII, Sec. 1 (1868).

[46] Robertson, Should Churches Be Taxed? 73-74 (1968).

[47] Ames, Proposed Amendments to the Constitution 277 (1897); Antieau, Carroll and Burke, Religion Under State Constitutions, *supra* note 13, at 123.

[48] 4 Cong. Rec. 5190, Part 6 (1875).

President Grant's suggestion had little effect on succeeding Congresses. For example, the constitutions of 10 States admitted to the Union after the adoption of the Fourteenth Amendment contained provisions for limiting the use of public funds in aiding religion but, at the same time, all had provisions for some variety of tax exemption for church properties used for religious purposes.[49] The enabling acts which the Congress passed in admitting each of these States contained a specific proviso that the constitution of a State seeking admission must not be "repugnant" to the Constitution of the United States. It is clear, therefore, that Congress never seriously entertained the notion that the exemption of church property from taxation offended, either in fact or in spirit, fundamental provisions of the Bill of Rights.[50]

D. *From the Blaine Amendment to the Present.* While, as we have stated, the Blaine Amendment never cleared the Congress, the ideas that it incorporated did find favor in a considerable number of the States, either existing or newly admitted to the Union. However, the catalyst which the Blaine Amendment provided the States in adopting constitutional provisions that limited

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[49]See Appendix B printed in the Supplement filed by the *amicus.*

[50]In 1876, President Grant himself signed the enabling act by which Colorado was admitted to the Union with a constitution which expressly exempted from taxation lots and buildings "used solely and exclusively for religious purposes." Colo. Const., Art. X, Sec. 5 (1876). He also signed two District of Columbia statutes, which incorporated provisions affording tax exemptions for religious property, one in 1876 and another in 1877. 16 Stat. 153 (1876) and 17 Stat. 399 (1877).

the expenditures of public funds to aid religion, many of them much more explicit and restrictive than the First Amendment, did not induce them to eliminate the constitutional or statutory authority which sanctioned tax exemptions for ecclesiastical property. An illustrative case demonstrates the point. The Constitution of Iowa contains a provision which reads very closely like the words of the First Amendment. It forbids laws "respecting an establishment of religion or compelling any person to pay . . . taxes . . . for building or repairing places of worship or the maintenance of any minister or ministry."[51] In *Trustees of Griswold College v. State*, 46 Ia. 275, 26 Am. Rep. 138 (1877), the Supreme Court of Iowa held that tax exemptions granted by statute[52] to religious related colleges did not violate the amendment of the Iowa Constitution cited above. Said the Iowa Supreme Court:

> "The argument is, that exemption from taxation of church property is the same thing as compelling contribution to churches to the extent of the exemption. We think the constitutional prohibition extends to the levying of tithes, taxes, or other rates for church purposes, and that it does not include the exemption from taxation of such church property as the legislature may think proper."[53]

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[51] Iowa Const., Art. 3, Sec. 1 (1857).

[52] Iowa Code Ann., Sec. 427.1(9) *et seq.*

[53] 46 Iowa at 282. See also, *Garrett Biblical Institute v. Elmhurst State Bank*, 331 Ill. 308, 163 N.E. 1 (1928), in which the Illinois Supreme Court held the exemption of the Institute from taxation did not violate either the Illinois or the United States Constitutions "either in spirit or letter. . . ." 331 Ill. at 318, 163 N.E. at 4.

Today, as in the beginning, every State in the Nation and the District of Columbia exempts church properties, at least those used for purposes of worship, from taxation.[54] Printed as Appendix B in the Supplement filed with this brief is a detailed compilation of the constitutional and statutory provisions of the various States through which tax exemptions are provided for houses of worship and related religious property. It shows that at the present time the constitutions of 36 States contain either a mandatory or permissive provision for the exemption. In the remainder of the States the exemption is provided by statute.[55]

E. *The Favorable Congressional View of Religious Exemptions.* Until fairly late in our constitutional development, the strictures of the First Amendment were thought to bind only the Federal Government and not the States. Therefore, any summary of the historical treatment of religious tax exemptions would be deficient unless it took into account the Congressional experience. Here, the history, as in the case of the States, is one of long-standing and unbroken approval of tax exemptions for church property. The *amicus* has already discussed the early appearance of such exemptions in the District of Columbia.[56] To that can be added the case of *Gibbons v. District of Columbia,* 116 U.S. 404 (1886),

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[54] *Constitutionality of Tax Benefits Accorded Religion,* Note, 49 Col. L. Rev. 968-69 (1949); Van Alstyne, *Tax Exemptions of Church Property,* 20 Ohio St. L. J. 461 (1959).

[55] See also Van Alstyne, *supra.*

[56] *Supra,* p. 40. See also the illustrative examples of early tariff exemptions for religious property listed in Appendix D printed in the Supplement.

involving an early Congressional exemption from taxation of properties used for purposes of religious worship.[57]

In legislation passed by the Congress since the Civil War, there has been a general policy of providing exemptions and deductions for religious purposes. After the reorganization of the District of Columbia, Congress passed specific exemptions for houses of worship within the District in the Acts of June 17, 1876, 16 Stat. 153, and the Act of March 3, 1877, 16 Stat. 399. Similar exemptions still exist in the District of Columbia to this date.[58] The ill-fated Federal Income Tax of 1894,[59] provided an exemption for religious institutions. The exemptions were carried over in the income tax laws enacted after the Sixteenth Amendment was adopted, and the principle has been effected in other types of revenue legislation, such as the estate and gift tax.[60] Additional tax exemptions currently afforded religious organizations by Federal law are set out in Appendix C of *amicus'* Supplement.

F. *The Ineluctable Conclusion from History.* This Court has often turned to relevant history in the adjudication of constitutional issues. In the sphere of the First Amendment, it has emphasized history both to strike down abridgements of the freedoms guaranteed

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[57] Discussed *infra*, p. 53.

[58] 47 D.C. Code 801 a (1967).

[59] 28 Stat. 509 (1894).

[60] I.R.C. (1954), Secs. 501 (c)(3), 2055 and 2522.

by that Amendment,[61] and to uphold statutes challenged under that great constitutional provision.[62] Surely, the Court will again find influential the lessons of the history which bears on the issue now before it. In constitutional law, as elsewhere, "doctrine is illuminated by history." *Kovacs v. Cooper*, 336 U.S. 77, 95 (1949).

That history is undebatable. From the time the Nation began, every State and Federal legislative body that has taken the question up has come down on the side of permitting tax exemption for church properties used for religious purposes. The members of all those legislatures took and were bound by, their oath or affirmation to support the Constitution as prescribed by Article VI thereof. Their firm view of the constitutionality of the practice is thus obvious. Moreover, unlike other historical practices of much less ancient vintage, such as Bible reading, prayers in public schools or the bus transportation of parochial school students, which some States permitted and other States denied, the history of the permissibility of religious tax exemptions has remained to the present time without a single adverse judicial pronouncement with respect to its legality under State or Federal constitutional provisions.

Finally, as a learned commentator has conceded, the religious tax exemptions sanctioned "during our history . . . [have] not in fact begun a series of steps toward

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[61] *Near v. Minnesota*, 283 U.S. 697, 713 (1931) ("liberty of the press as historically conceived and generated").

[62] *McGowan v. Maryland*, 366 U.S. 420, 440 (1961) (". . . we find the place of Sunday Closing Laws in the First Amendment's history both enlightening and persuasive").

the establishment of religion."[63] Whatever efficacy *in terrorem* arguments might have in other controversies over the interpretation and reach of the Non-Establishment Clause, in the light of the indisputable history of religious tax exemptions, such arguments have no place in the resolution of the question which the Court has before it for decision.

We close the argument from history as we began it—with a quotation from Mr. Justice Holmes: "Upon this point a page of history is worth a volume of logic."[64] Here, all the pages of the relevant history tell the same story: there is nothing in the Non-Establishment Clause or in the Fourteenth Amendment that was intended to prohibit the universal practice of exempting church properties from taxation.

## IV.

## The Case Precedents Unanimously Support Tax Exemptions of Church Property

A. *The Force of Precedent.* In the preceding section of this brief, the *amicus* appealed to the undeviating history of the legislative practice of permitting tax exemptions for church property as reason for not holding such exemptions to be unconstitutional at this late day. In the section which follows we "fortify [the historical] principle with precedent."[65] As Mr. Justice Clark once said in another context:

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[63]Paulsen, *Preferment of Religious Institutions In Tax and Labor Legislation,* 14 Law & Contemp. Probs. 120, 147 (1949).

[64]*New York Trust Co. v. Eisner,* 256 U.S. 345, 349 (1921).

[65]Holmes, The Common Law, *supra* note 9, at 209.

> "The fact that a practice is followed by a large number of states is not conclusive in a decision as to whether that practice accords with due process, but it is plainly worth considering in determining whether the practice 'offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "[66]

As we now show, not only does the practice of permitting tax exemption for religious property exist in *all* of the States, but that practice has been upheld as constitutional by *every* court, State or Federal, including this Court, that has ever passed upon the issue. *Stare decisis* may have limitations when the doctrine is invoked in the adjudication of constitutional questions, and a "constitutional interpretation that is wrong should not stand." *Connecticut General Life Ins. Co. v. Johnson,* 303 U.S. 77, 85 (1938). Nevertheless, the accumulated force of unanimous judicial opinion, consistently adhered to by the courts of the Country, and voiced many times from colonial days to the present, constitutes a formidable basis from which to argue for the continued constitutional permissibility of tax exemptions for church properties.

B. *The State and Lower Court Decisions Unanimously Support the Exemptions.* A careful search of the reported decisions from 1791 to the present confirms the conclusion reached in 1956 by the Supreme Court of California, in one of the leading State court decisions on the issue, that:

> "No case has been found holding that the granting of such exemptions is contrary to State or

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[66] *Leland v. Oregon,* 343 U.S. 790, 798 (1952).

> Federal constitutional provisions prohibiting the support or establishment of religion, and, when the matter has been raised, the exemptions have been upheld."[67]

That was true in respect to the State court cases decided before this Court's landmark decision in *Everson v. Board of Education*, 330 U.S. 1 (1947). Representative cases are cited below.[68] Similarly, the State courts which have been called upon to take up the issue of religious tax exemptions after this Court spoke in *Everson* have continued to uphold tax exemptions for church properties, finding nothing in the strict "wall of separation" doctrine which the Court enunciated in that case to require the elimination of such exemptions because of the Non-Establishment Clause of the First Amendment.[69]

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[67] *Lundberg v. County of Alameda*, 46 Cal.2d 644, 298 P.2d 1, 7 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956); see also *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73, 77 (1961), *app. dism.* 369 U.S. 423 (1962).

[68] *Congregational Society v. Ashley*, 10 Vt. 241, 245 (1838); *Orr v. Baker*, 4 Ind. 86 (1853); *State v. Collector of New Jersey*, 24 N.J.L. 108, 120 (1853); *Trustees of Griswold College v. Iowa*, *supra* note 53; *State v. Alabama Educational Foundation*, 231 Ala. 11, 163 S. 527 (1935); *Trustees of First Methodist Episcopal Church v. City of Atlanta*, 76 Ga. 181, 193 (1886); *Rice Co. v. Bishop Seabury Mission*, 90 Minn. 92, 95 N.W. 882 (1903); *Yale University v. Town of New Haven*, 71 Conn. 316, 42 A. 87 (1899); *St. Barbara's Church v. City of New York*, 243 App. Div. 371, 277 N.Y. Supp. 538 (1935); *Commonwealth v. Y.M.C.A.*, 116 Ky. 711, 719, 76 S.W. 52[illegible] (1903); and *Y.M.C.A. v. Douglas Co.*, 160 Neb. 642, 646, 83 N.W. 924, 926 (1900).

[69] *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962); *Lundberg v. County*

The United States Court of Appeals for the District of Columbia Circuit also had occasion to pass upon a collateral aspect of the issue in an opinion written by the present Chief Justice of this Court. The case involved the question of whether the real property tax exemption afforded religious organizations extended to one which denied the existence of a supreme being. In deciding that the exemption did cover such a religious group, the court said:

> "Congress in granting tax exemptions under this statute like most of the states, was giving expression to a broad legislative purpose to grant support to elements in the community regarded as good for the community . . . . To construe exemptions so strictly that unorthodox or minority forms of worship would be denied the exemption benefits granted to those conforming to the majority beliefs might well raise constitutional issues."[70]

The precise rationales upon which the State and lower Federal courts unanimously arrived at the same conclusion concerning the constitutionality of tax exemptions for church property have varied. Some courts seem to rest their holdings on the fact that the benefit received by the religious denomination as a result of the tax exemption was "incidental to the achievement of a public

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*of Alameda*, 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956); *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966); *Fellowship of Humanity v. County of Alameda*, 153 Cal.2d 673, 315 P.2d 394, 408 (1957); *Missionaries of Our Lady of La Salette v. Michaliski*, 15 Wis.2d 593, 113 N.W.2d 593 (1955).

[70] *Washington Ethical Society v. District of Columbia*, 101 App. D.C. 371, 373, 249 F.2d 127, 129 (1957).

purpose." *Lundberg v. County of Alameda, supra,* at 7. Other courts apparently drew their support from the fact that the activities conducted by religious denominations, like the activities of other exempted organizations, represented programs which "are thought to be in the public interest and welfare." *Washington Ethical Society v. District of Columbia, supra,* at 129. And still others, obviously impressed with the antiquity and universality of the practice and its characteristic of State-Church accommodation, wished to avoid "a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people." *General Finance Corp. v. Archetto, supra,* at 78.

Whatever the exact bases of particular decisions, the point is that every state and federal court that has ever dealt with the issue from 1791 to the present day has upheld the constitutionality, under State and Federal constitutional provisions, of the traditional American practice of affording exemptions from State taxation for church properties. Like the lesson drawn from history, the imposing array of State and lower Federal court precedents supports the decision of the New York courts in this case. Mr. Justice Cardozo once said that the "power of precedent, when analyzed, is the power of the beaten track."[71] Here, the beaten track marked out by the precedents shows no detours, side roads, or even aberrational departures in upholding tax exemptions for churches.

C. *The Precedents Sustaining Religious Tax Exemptions in This Court.* Prior to its decision in the *Everson*

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[71] Cardozo, Growth of the Law, 62 (1924).

case, this Court apparently had been presented with only one opportunity to pass upon a religious tax exemption within the context of the First Amendment.[72] In that case, the Court acknowledged in *dicta* that in the exercise of the legislative power to classify and to exempt, including the exemptions for church buildings and grounds, "Congress, like any State legislature unrestricted by constitutional provisions, may at its discretion wholly exempt certain classes of property from taxation, . . ."[73] However, *Gibbons v. District of Columbia* cannot fairly be regarded as a controlling precedent for the proposition that religious tax exemptions are not barred by the First Amendment.

During the pre-*Everson* period, also, the Court frequently had before it cases raising the claim of unreasonable classifications on the part of State taxing authorities in alleged violation of the Equal Protection Clause of the Fourteenth Amendment. In several of these, the Court used the exemption for churches as an example of a reasonable and nondiscriminatory method of adjusting a system of taxation consistently with the Equal Protection Clause. Perhaps the case most cited is *Bell's Gap R. Company v. Pennsylvania*, 134 U.S. 232 (1890). Mr. Justice Bradley stated for the Court:

> "The provision in the Fourteenth Amendment that no State shall deny to any person within its jurisdiction the equal protection of the law was

[72] *Gibbons v. District of Columbia*, 116 U.S. 404 (1806). See also *Bishop of Nesqually v. Gibbon*, 158 U.S. 155 (1895) where, again in *dicta*, the Court made reference to the secular benefits underlaying the "principle that exempts from taxation the property of religious organizations," 158 U.S. at 171.

[73] 116 U.S. at 408.

> not intended to prevent a state from adjusting its system of taxation in all proper and reasonable ways. *It may, if it chooses, exempt certain classes of property from any taxes at all, such as churches,* libraries and the property of charitable institutions."[74] [Italics supplied.]

The Court, quoting Mr. Justice Bradley's language, made the same point in several other decisions. *Magoun v. Illinois Trust and Savings Bank,* 170 U.S. 283, 295 (1898); *Rogers v. Hennepin Co.,* 240 U.S. 184, 192 (1916). Mr. Justice Bradley's words were also quoted In *Flint v. Stone Tracy Co.,* 220 U.S. 107, 160 (1911), a case involving the corporation tax which Congress had imposed by virtue of provisions of the Tariff Act of 1909.[75] In none of these cases, however, did the parties raise, or the Court perceive, any First Amendment problem for religious tax exemptions, including the *Flint* case, *supra,* in which the taxing power of the Congress was at issue.

Following the *Everson* case, however, the Court has had at least three prior opportunities to decide the issue raised on the instant appeal. In two instances this Court upheld the exemption on the merits. In the third it denied *certiorari,* allowing a decision by the highest court of Maryland in favor of the exemption to stand. The first was *Lundberg v. County of Alameda,* 46 Cal.2d 644, 298 P.2d 1 (1956), *app. dism. sub nom. Heisey v. County of Alameda* 352 U.S. 921 (1956). In that case, California tax exemptions for religious schools were unsuccessfully challenged in the courts of that

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[74] 134 U.S. at 237.

[75] 36 Stat., Ch. 6, 11, 112-117 (1909).

State on First Amendment grounds. The Supreme Court of California held that:

> "[E]ven if we regard the exemption as benefiting religious organizations, it does not follow that it violates the First Amendment. The practice of granting tax exemptions benefiting religious sects began in the colonial period. Today, at least some tax exemption for religious groups is authorized by statutory or constitutional provisions in every state and the District of Columbia, as well as by federal law. No case has been found holding that the grant of such exemptions is contrary to state or federal constitutional provisions prohibiting the support or establishment of religion, and where the matter has been raised, exemptions have been upheld."[76]

This Court dismissed the appeal "for want of a substantial federal question." 352 U.S. 921 (Black, J. and Frankfurter, J., *dissenting*).

Again, in *General Finance Corp. v. Archetto*, 93 R.I. 392, 176 A.2d 73 (1961), *app. dism.* 369 U.S. 423 (1962), the Court dismissed, "for want of a substantial federal question," an appeal taken from a unanimous decision of the Rhode Island Supreme Court which had upheld tax exemptions for religious bodies, although Mr. Justice Black was of the opinion that probable jurisdiction should have been noted. Finally, in *Murray v. Comptroller of the Treasury*, 241 Md. 383, 216 A.2d 897 (1966), *cert. den.* 385 U.S. 816 (1966), the Court denied a petition for *certiorari* seeking review of a decision of the Court of Appeals of Maryland upholding tax exemption for structures used exclusively for public worship.

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[76] 298 P.2d at 7.

While the Court's denial of *certiorari* in the *Murray* case may not be taken as any expression of opinion by this Court upon the merits of the decision rendered by the Maryland court,[77] its decisions in the *General Finance* and *Heisey* cases are of very different dimension. When this Court dismisses an appeal for want of a substantial question, it is deciding the case on its merits.[78] Moreover, both the Rhode Island Supreme Court in the *General Finance* case and the California Supreme Court in the *Heisey* case considered and rejected the argument that the First Amendment barred the religious tax exemptions involved in those cases. Therefore, the *General Finance* and *Heisey* cases must be counted among the list of precedents provided by the courts of the Nation in sustaining, either directly or indirectly, the validity of exemptions for church property either under the First Amendment or analogous provisions of State constitutions. The list is unbroken, in the State courts, in the lower Federal courts, and in this Court. In this important respect, exemptions for church property are distinguished from other types of State-Church involvements in which certain forms of government assistance have been upheld in some cases and struck down in others.[79]

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[77] *Wade v. Mayo*, 334 U.S. 672, 680 (1948).

[78] *Barton v. Sentner*, 353 U.S. 963 (1957); Stern & Gressman, Supreme Court Practice 164 (3d Ed.).

[79] State supplied sectarian textbooks were upheld by this Court in *Cochran v. Board of Education*, 281 U.S. 370 (1930) and in *Board of Education v. Allen*, 392 U.S. 236 (1968), but denied by Oregon under its own constitution in *Dickman v. School District No. 620*, 230 Ore. 238, 366 P.2d 533 (1961). In *Everson v. Board of Education*, 330 U.S. 1 (1947), this Court sustained the practice of providing bus transportation by State

Moreover, unlike the background preceding this Court's comparatively recent landmark decisions in the areas of civil rights and reapportionment, there is not only present here a long continued, completely consistent history and unbroken chain of judicial precedents, but also absent in this instance are any compelling demands of the existing social order for the vindication of fundamental constitutional rights such as existed in those historic cases. Where history and the course of judicial decisions point in uncertain directions,[80] the

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or local authorities for all pupils, including those attending religiously-related schools. On the other hand, some State courts have reached the opposite result under the provisions of their own constitutions. *Gurney v. Ferguson,* 190 Okla. 254, 122 P.2d 1002 (1942); *Mitchell v. Consolidated School Dist. No. 201,* 17 Wash.2d 61, 135 P.2d 79 (1943). Again, grants for neglected and dependent children in denominational homes and institutions have been upheld in some States, *Schade v. Allegheny Co. Institution District,* 386 Pa. 507, 126 A.2d 911 (1956), while tuition payments were set aside in another, *Swart v. South Burlington Town District,* 122 Vt. 177, 167 A.2d 514 (1960), *cert. den. sub nom. Anderson v. Swart* 366 U.S. 925 (1961).

[80]Thus, it can be fairly maintained that this Court's repudiation in 1954 in *Brown v. Board of Education,* 347 U.S. 483, of the invidious "separate but equal" concept approved in *Plessy v. Ferguson,* 163 U.S. 537 (1896), apart from its long overdue recognition of the gross injustice of such a policy, represented a return to the original historical purposes of the post Civil War amendments, as exemplified by the Court's earlier decision in *Strauder v. West Virginia,* 100 U.S. 303 (1879). Dixon, Democratic Representation 141 (1968). Similarly, however revolutionary *Baker v. Carr,* 369 U.S. 1, and the ensuing 1964 *Reapportionment Cases,* 377 U.S. 533 *et seq.*, may have appeared to some critics, earlier decisions of the Court, *Wood v. Broom,* 287 U.S. 1 (1932), and *Smiley v. Holm,* 285 U.S. 355 (1932), can be read to sustain its jurisdiction to take up and decide claims of legislative malapportionment. Moreover, the early history of the United States, at least well into the second half of the Nine-

Court is correct in interpreting basic constitutional provisions in the context of the present national social structure, especially when not to do so would sacrifice present justice to a past history, however lamentable. On the other hand, when, as in the case at bar, an undeviating history, unbroken judicial precedents and the realities of the existing social structure all support the continuation of practices deeply imbedded in the mores of the people and universally accepted, we believe that sound constitutional construction dictates that such practices be upheld and not outlawed by this Court.

## V.

## The New York Exemption Is Fully in Accord With This Court's Decision in *Everson*

Solidly grounded in legislative history and judicial precedent, religious tax exemptions also draw firm constitutional support from a diversified array of Church-State decisions by this Court. The modern development of the religious guarantees of the First and Fourteenth Amendments begins with the Jehovah Witnesses' cases of the early 1940's. That development has continued steadily through such landmark decisions as *Everson, McGowan* and *Schempp.*[81] If one fact stands out clearly

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teenth Century, also supports the proposition that representation in legislative bodies was to be based substantially on population. McKay, Reapportionment: The Law and Politics of Equal Representation 9-98 (1965).

[81] *Everson v. Board of Education,* 330 U.S. 1 (1947); *McGowan v. Maryland,* 366 U.S. 420 (1961); *School District of Abington Township v. Schempp,* 374 U.S. 203 (1963).

from this development, it is the perennial concern of this Court to restrict the government to secular activities and to protect the religious freedom of individuals and institutions. Religious tax exemptions of the type involved in this case make an enormous contribution precisely to the secularity of government and to the religious liberty of all citizens and organizations.

In his argument against these exemptions, appellant seeks to derive support from certain statements by this Court in *Everson*. He appears to rely principally, if not solely, on the "no aid to religion" language of *Everson* in order to demonstrate the constitutional impermissibility of the New York type of religious tax exemption.[82]

The short answer to this argument from the *Everson* language is that appellant has taken absolutely no cognizance of the rest of the *Everson* opinion, of the decision actually reached in the *Everson* case, or of the other Church-State decisions rendered by this Court.

At the outset it should be noted that the *Everson* opinion was never intended as a comprehensive treatise on the constitutionality of the many relationships between religion and government in our country. The precise question before the Court in *Everson* was whether the religious guarantees of the First Amendment, as incorporated in the Fourteenth, precluded a State from providing a comprehensive scheme of safe transportation to *all* school children, including those attending parochial schools. Accordingly, the "no aid" language of *Everson* must be read in the context of this issue—an issue, not

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[82]Cf. Brief for the Appellant, pp. 6-7.

of *exemption* from a general secular law, but of *inclusion* in a general affirmative program of secular governmental services.

In *Everson*, the Court did not address itself clearly in any way to the question of which religious exemptions from general secular laws are mandatory, permissible or forbidden by the First and Fourteenth Amendments. On the other hand, both nine and fifteen years after the *Everson* decision, this Court dismissed attacks on the New York type of tax exemption for lack of a substantial federal question.[83] Moreover, the Court has quite explicitly addressed itself to many phases of the constitutionality of religious exemptions from general secular laws in a number of cases both before and after *Everson*.[84] It is obvious, therefore, that any argument against the New York type of exemption that is based solely on the "no aid" language of *Everson* is an argument that takes the language out of its proper constitutional context.

Moreover, appellant's reliance on the "no aid" language in *Everson* overlooks the equally important language, in the immediately succeeding paragraph of the opinion, that explains the constitutional prohibitions on

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[83] *Heisey v. County of Alameda*, 352 U.S. 921 (1956); *General Finance Corp. v. Archetto*, 369 U.S. 423 (1962).

[84] *Jones v. Opelika*, 316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943); *Murdock v. Pennsylvania*, 319 U.S. 105 (1943); *Follett v. Town of McCormick*, 321 U.S. 573 (1944); *Board of Education v. Barnette*, 319 U.S. 624 (1943); *Zorach v. Clauson*, 343 U.S. 306 (1952); the *Sunday Closing Law Cases*, 366 U.S. 420, 582, 599, 617 (1961); *School District of Abington Township v. Schempp*, 374 U.S. 203 (1963); and *Sherbert v. Verner*, 374 U.S. 398 (1963).

discrimination *against* religion.[85] And somewhat later in the opinion, the Court affirms flatly that State Power "is no more to be used so as to handicap religions, than it is to favor them."[86] In short, *Everson* stands for "no hurt" just as much as for "no aid." Appellant has attempted to make the "no aid" language a substitute for the First and Fourteenth Amendments. This was certainly not the intention of the Court.

Finally, appellant offers no reconciliation of the "no aid" language with the result actually reached by the Court in *Everson.* Safe transportation was upheld for all school children, even though it may have encouraged and assisted some parents in choosing a parochial rather a public school. The "no aid" language, therefore, cannot be read as a literal, absolute test.

This is all the more evident in light of the Court's acceptance in *Everson* of the legitimacy of the universal practice of providing fire and police protection, sewage facilities, and the use of streets and sidewalks to religious organizations in common with the rest of the community. Such services, "so separate and so indisputably marked off from the religious function,"[87] are not inconsistent with the "no aid" language of *Everson* because that language was aimed to suppress such Establishment practices as compulsion of attendance at religious services, official professions of faith, the imposition of tithes and taxes for churches and ministers, and criminal pun-

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[85] 330 U.S. at 16.

[86] 330 U.S. at 18.

[87] *Ibid.*

ishments and civil disabilities for religious dissenters.[88] These are the kinds of "aid" that the First and Fourteenth Amendments clearly forbid.

On the other hand, when government provides its general secular services to churches as part of the general public in our society, *Everson* finds no constitutional bar. *Everson* mentions "the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion."[89] The *Everson* result, however, affirms that the line exists, and that it is a line of great constitutional significance.

In the case at bar, the City and State of New York are simply providing the same secular services to churches that they provide to all other elements in the community. Accordingly, the "no aid" language of *Everson* has no determinative relevance in this controversy. If the New York exemption is to be struck down on the ground that it "aids" religion in a constitutionally forbidden manner, this Court must go immensely further than the *Everson* decision ever dreamed.

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[88]See the Court's discussion of the background of the First Amendment, 330 U.S. at 8-16.

[89]330 U.S. at 14.

## VI.
## The New York Exemption Is Fully in Accord With This Court's Decision in *Schempp*

*Everson* was decided in 1947; *Schempp* was decided in 1963. In the intervening sixteen years this Court decided a number of Church-State controversies ranging from religious instruction in the public schools to public observance of Sunday as a common day of rest. Throughout this period of constitutional development, some litigants in this Court have persisted in urging an absolute and literal extension of the "no aid" passage. Their persistence has been unavailing. In *Schempp*, this Court repeated the language of *Everson* and gave it a refined interpretation:

> "The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion."[90]

The first case cited by *Schempp* to support this test is *Everson v. Board of Education.*

Any doubt that might have lingered about the relationship of *Schempp* to *Everson* was settled last year by this Court's decision in *Board of Education v. Allen.*[91] Once again, the question was whether the Fourteenth Amendment permits a State to extend a secular educational benefit (the free loan of secular textbooks) to all

[90] 374 U.S. at 222.

[91] 392 U.S. 236 (1968).

school children, including parochial school children. In answering this question, the Court did not content itself with simply asking whether the State program resulted in aid to religion. The Court acknowledged that there would be some incidental religious effects, but cited *Everson*, applied the *Schempp* test and upheld the lending program.

It is manifest, therefore, that if appellant's basic argument is the "no aid" passage from *Everson*, his case must fail. Proof that a governmental program results in some type of aid to religion may raise a constitutional question but does not settle it. Appellant has provided no basis for settlement but an absolute and literal extension of the "no aid" language, an application that the Court has steadfastly rejected from *Everson* to *Schempp* to *Allen*.

It remains true, however, that the *Schempp* test "is not easy to apply," as this Court frankly acknowledged in *Allen*.[92] Nevertheless, *amicus* believes that New York's religious tax exemption satisfies the *Schempp* test.

A. *Application of the Schempp Test.* The *Schempp* test requires a secular purpose and a primary secular effect that neither advances nor inhibits religion. New York has exempted the property of religious organizations that is used exclusively for religious purposes. In applying the *Schempp* test to this exemption, a fundamental distinction must be made between two types of religious organizations:

(1) Organizations exclusively concerned with houses of worship;

[92] 392 U.S. at 243.

(2) Organizations that, in addition to conducting a house of worship and other "exclusively religious" activities, also conduct "service activities" (such as caring for the sick, the poor, the blind, the ignorant, the orphaned and the elderly) that are of immense benefit to the secular general welfare.

With respect to the second category of religious organizations, it is manifest that the *Schempp* test is fully satisfied. The services rendered by such organizations are of inestimable benefit to the community. In granting tax exemption to such organizations, the legislature intends to encourage, and actually does encourage, the development of such services. Moreover, the legislature makes certain that the private charitable organization that is infused and energized by religious belief is in no way put at a disadvantage with respect to the private charitable organization, also tax exempt, that is wholly secular or militantly atheistic in its motivation.

It can truly be said, with respect to religious organizations that conduct schools, hospitals, orphanages and homes for the aged, that tax exemptions have a high secular purpose and that there is a direct, primary and secular benefit to the community, an effect that is wholly independent of any religious effects of the exemption statute. Thus, the *Schempp* test is fully satisfied. Short of extreme emergencies, no community in its right mind would reduce the resources of any private nonprofit organizations that feed the hungry, clothe the naked and care for the sick. And diminution in the services these organizations render would have to be offset, at least in most instances, by increased services from the State.

Since private nonprofit organizations, especially religious organizations, operate to a substantial extent on the basis of freely donated services by their members, and since the State would have to pay all of its employees at the market rate, there can be no doubt that it would cost the community far more to provide these services at public expense than to encourage their contribution by private nonprofit agencies, regardless of the religious or secular character of their inspiration.

What, however, of the religious organization that is engaged exclusively in divine worship? Its activities are not only "exclusively for religious purposes"; they are also "exclusively religious" in the sense that it is no part of the ordinary business of government to supply them.[93] If the religious faith of the American people were to wane tomorrow, and every sanctuary and synagogue in the land were to disappear, the hand of government could not be lifted to restore what the people had abandoned. What secular purpose, what independent secular effect, is there then in the grant of an exemption to a religious organization whose existence and survival are constitutionally committed to the free choice of citizens, not to the government?

In exempting such organizations, New York intends and achieves at least three secular effects: (1) fostering the objectives of the separation of Church and State;

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[93]As this Court noted in *Schempp*, governmental regulation of the "temporal and geographic environment" of military personnel may justify public provision of voluntary religious services. 374 U.S. at 226, n. 10. The same would seem to be true of the situation of patients in public hospitals and of prisoners in jails and penitentiaries.

however, that an exemption may be granted, not to encourage an institution, but to *abstain* from unnecessary interference with it.

There are at least two distinctly different types of private nonprofit organizations: (a) those that provide services that the government would have to provide, or might lawfully choose to provide, if the private organizations did not exist; and (b) those that are engaged in activities outside the constitutional scope of governmental authority. In dealing with organizations of the first type, government may stimulate their growth through exemptions, grants and other deliberately favorable laws.

In dealing, however, with organizations of the second type, government's functions are much more limited. Government cannot finance them directly, but it must at least provide the legal framework for their existence. Government should also abstain from unnecessary interference with their growth and activities. Exemptions are an eminently suitable means for this non-interference.

It cannot be emphasized too much that American constitutional law is built on the bedrock conviction of the people that government should be limited in its purposes, powers and activities. Nowhere is the role of government more limited than in the sphere of fundamental opinions and beliefs. Religion is the prime example of this sphere, but not the only one. Philosophy is another. In an era of expanding government, and especially of heavier taxation to support a wide variety of social services, the government should never lose sight of the impact of its tax policies on organizations whose activities are constitutionally outside its ken. When the

government holds back its taxing power with respect to these organizations, it is simply recognizing its own limited and strictly secular competence. Such exemptions do not signify governmental approval–rather, they guarantee governmental neutrality.

Finally, tax exemptions of houses of worship have a third secular purpose and effect through the legislative choice of economically suitable subjects of taxation. The fundamental purpose of the tax laws is to raise revenue, and to raise it fairly and equitably. Purely economic considerations justify many types of exemptions and exclusions from tax liability. There is no general constitutional principle that every piece of property must pay taxes.[94] Exemptions are not universally acts of legislative grace; they may be, and often are, dictated by purely economic considerations of efficiency in the administration of the tax laws and of the relationship between the taxable subject and the production of wealth.

With relation to charitable nonprofit organizations in general, and houses of worship in particular, exemptions from the *ad valorem* property tax have a strictly secular economic justification. It is neither fair nor reasonable to assess property devoted to nonprofit purposes on the basis of what the property would bring if devoted to commercial purposes. It would be ridiculous to assess a church on the same basis as a farm or factory. The difficulty of devising a suitable assessment formula for

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[94]See the excellent discussion of this point, and of religious tax exemptions in general, in Gianella, *Religious Liberty, Nonestablishment and Doctrinal Development–Part II. The Nonestablishment Principle*, 81 Harv. L. Rev. 513, 544-54 (1968).

church property devoted to worship fully justifies the exemption of such property from the *ad valorem* tax.

Moreover, property devoted to nonprofit purposes, and particularly to religious purposes, does not generate income. It is a necessary expense for the conduct of the nonprofit purpose, religious or secular. State legislatures have recognized this fact clearly by granting exemption to property actually used for religious purposes but denying it to property owned by churches but used commercially for the production of income.

Viewed in the light of these secular purposes and effects, the New York exemption fully satisfies the *Schempp* test. Accordingly, there is ample justification for holding that this exemption falls within the broad discretionary area that this Court has often recognized as a necessary attribute of the Federal and State legislatures in apportioning the burden of taxation.

B. *Is the Schempp Test Fully Applicable?* The *Schempp* test represents the culmination of a long effort by this Court to find a suitable touchstone for the constitutionality of governmental programs and expenditures that affect religion and religious institutions. *Amicus* is doubtful, however, that the Court intended the literal thrust of the *Schempp* test to apply to the area of exemptions for religious reasons from general secular laws. For example, the same day that this Court decided *Schempp*, it also decided *Sherbert v. Verner*.[95]

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[95] 374 U.S. 398 (1963). Mr. Justice Brennan, who wrote the opinion for the Court in *Sherbert*, stated unequivocally in his concurring opinion in *Schempp*: "Nothing we hold today questions the propriety of certain tax deductions or exemptions which incidentally benefit churches and religious institutions,

In holding that South Carolina was compelled by the Fourteenth Amendment to grant an exemption to a Seventh Day Adventist from one of the provisions in the unemployment compensation laws, the Court did not rest its decision in any way on the language of the *Schempp* test. Quite different considerations governed the Court's decision: religious equality, the substantiality of the burden on the woman's practice of her religion, and the extent to which the exemption would interfere with the State's administration of its unemployment program.

Moreover, it is fairly manifest from other decisions of this Court that the *Schempp* test was not intended as the unique and universal touchstone of the constitutionality of all relationships between the government and religion. Last January, this Court reaffirmed that the Constitution forbids the use of the "change of doctrine" test in the judicial settlement of church property controversies.[96] In its opinion, the Court cited *Schempp* solely for the propositions that "the First Amendment enjoins the employment of organs of government for essentially religious purposes" and that the same amendment "prohibits a State from employing religious organizations as an arm of the civil judiciary to perform

along with many secular charities and nonprofit organizations." 374 U.S. at 301. It is also noteworthy that the majority opinion in *Schempp*, although silent on the subject of religious tax exemptions, expressly reserved decision on the subject of governmental provision of voluntary religious services to personnel in the armed forces. 374 U.S. at 226, n. 10. It is evident, therefore, that the majority had at least one reservation about the universal application of the "secular purpose and primary secular effect" doctrine.

[96] *Presbyterian Church v. Hull Church*, 393 U.S. 440 (1969).

the function of interpreting and applying State standards."[97] The governing principles used by the Court in outlawing the "change of doctrine" test in the *Hull Church* case are taken entirely from *Watson v. Jones,*[98] as qualified by *Gonzalez v. Archbishop,*[99] and erected into constitutional status by *Kedroff v. St. Nicholas Cathedral*[100] and *Kreshik v. St. Nicholas Cathedral.*[101]

Church property disputes illustrate the inevitable complexity of American Church-State relationships and the impossibility, in some areas of Church-State contact, of defining the constitutional standard of "neutrality" simply in terms of avoiding "help" or "hurt" to religion. When a church congregation splits in dissension and both groups claim the property in the civil courts, government is compelled to act. No matter which side wins the case, government has "helped" one religious group and "hurt" another. Moreover, no matter what secular standard of decision the government adopts, the effect on both religious groups is immediate and substantial.

Taxation is another area in which the contact between government and religion is unavoidable and substantial. In common understanding, at least, taxation "hurts" and exemption "helps." In such circumstances, where the effects on religion are immediate, substantial and unavoidably helpful or hurtful, the *Schempp* test does

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[97] 393 U.S. at 449.

[98] 80 U.S. 679 (1871).

[99] 280 U.S. 1 (1929).

[100] 344 U.S. 94 (1952).

[101] 363 U.S. 190 (1960).

not provide a distinct guideline. The *Schempp* test was especially designed to govern situations in which the government asserts a secular justification for affirmative public activities and expenditures. As such, it has served well to draw a clean line between *forbidden* use by government of religious means for secular ends, and *permissible* use by government of secular means, to take a case, for the improvement of secular education of all school children, regardless of the secular or religio-secular character of the school they attend.

Moreover, the requirement of the *Schempp* test that there be a secular primary effect that neither advances nor inhibits religion makes it doubtful that the Court intended the test to apply to situations in which a State, out of deference to religious convictions or status, grants an exemption from a general secular law. When government grants such an exemption, the religious effect is immediate and deliberate. Although such exemptions can and do have secular purposes and effects, as *amicus* has shown above, it seems somewhat artificial and strained to justify such exemptions on the basis of a careful distinction between their religious and secular effects, at least as those terms are commonly understood. That distinction is constitutionally more appropriate when the government insists that its legislative program is fundamentally secular in design and effect, in the sense that religious considerations were not important in the motivation of the legislation, and that any religious effects of the law are purely incidental. Government cannot literally make that type of assertion when it grants exemptions, out of deference to religious convictions or status, from general secular laws.

The fundamental constitutional value that the *Schempp* test was designed to protect is "wholesome

neutrality" towards religion in the field of governmental activities and expenditures.[102] When government engages in affirmative programs for the general welfare, wholesome neutrality requires that the programs be truly secular in character. When, however, government seeks to accommodate its programs to the deeply held religious beliefs of part of its citizens, or when government refrains from the imposition of a tax burden on all religious organizations in order to minimize its involvement with religion and its interference with the free exercise of religion, its wholesome neutrality is achieved not so much by the "secular" character of the government's action as by the balance that the government strikes between secular and religious interests.

If, therefore, as *amicus* suggests, the *Schempp* test was not specifically designed by this Court to apply to the type of exemption at issue in this case, other constitutional criteria should be employed. These criteria unquestionably appear in the decisions of this Court that are directly concerned with religious exemptions from general secular laws. Applied here, those criteria fully sustain the constitutional permissibility of the New York type of tax exemption.

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[102] 374 U.S. at 222.

## VII.

### The New York Exemption is Fully in Accord With This Court's Decisions in the Area of Religious Exemptions From General Secular Laws

Religious exemptions have played an important role in the development of American Church-State policy. To be properly evaluated, they must be viewed within the context of the many facets of that policy at the Federal and State level. Taken in isolation, exemptions, perhaps, might seem to be an unconstitutional form of "aid"; taken in context, exemptions are clearly an important consitutional form of "accommodation."

In addition to permitting exemptions from property taxes for houses of worship but forbidding their direct support by tithes and taxes, American Church-State policy has guaranteed freedom of worship, preaching and education at the same time that it has prohibited European types of church establishment and any unnecessary governmental involvement with religious affairs. Accordingly, the American doctrine of separation of Church and State cannot be explained in a single sentence. Neither, despite the best efforts of some eminent constitutional scholars,[103] can the constitutionality of the manifold relationships between religion and government be determined by a single formula. The Constitution itself required two clauses to define the relationship

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[103]See, for example, Kurland, Religion and the Law (1962). For the difficulties in constructing a single test even for just one of the religion clauses, see Schwarz, *No Imposition of Religion: The Establishment Clause Value*, 77 Yale L.J. 692 (1968).

between religion and government; it is unlikely that they can ever be reduced to one.

For these reasons, the constitutional permissibility of the universal practice of granting tax exemptions to houses of worship must not be viewed in isolation from the carefully articulated Church-State relationships of which this practice is only a part. For example, it is extremely significant that, with respect to houses of worship and other "exclusively religious" organizations, the States have uniformly followed a positive policy on *exemptions* and a negative policy on *grants*.

This careful and universal distinction between exemptions and grants strongly suggests that the States have seen a decisive constitutional difference between the effects of exemptions and the effects of grants with respect to houses of worship. These differences are both financial and political. On the financial side, exemptions do not pay the purchase price of land, the construction cost of churches or the salaries of ministers. Grants could. On the political side, there is no competition for exemptions—they are available to all religious groups (including those militantly opposed to traditional forms of organized and theistic religion) and to a wide variety of charitable and educational organizations.

On the other hand, grants to houses of worship, because of the limitations on the amount of money available, might tend to stimulate precisely the political competition that the First Amendment was designed to eliminate. Owing to their neutral financial and political effects, exemptions can be rightly viewed by the States as a fitting expression of "wholesome neutrality."

As Professor Freund has put it:

> "The traditional tax exemption of church-related property is sometimes advanced as a legal argument for subsidies, which are viewed as an economic equivalent. The argument, however, proves too much, since church buildings themselves are exempted, and it would hardly be argued that therefore subsidies for the building of churches would be valid. Moreover, the symbolism of tax exemption is significant as a manifestation that organized religion is not expected to support the state; by the same token the state is not expected to support the church. Psychologically, too, the the exemption differs from subsidy; the former is viewed as an entrenched status; the latter as a recurring political issue."[104]

If, contrary to our whole history, tax exemptions of houses of worship were part of a grant instead of a no-grant pattern at the State and Federal level, the constitutional question before this Court would be entirely different from what it actually is. The question would then be the extent of First and Fourteenth Amendment prohibitions on direct and purposeful financial support by government of churches precisely as churches—a question which this Court has already strongly answered in *Everson* and *Schempp*. Since, however, the State and Federal governments have joined a positive policy on exemptions of houses of worship with a negative policy on grants in that quarter, the constitutional question cannot be simply whether the exemp-

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[104] Freund, *Public Aid to Parochial Schools*, 82 Harv. L. Rev. 1687, n. 16 (1969).

tions aid the houses of worship, but must be whether the dual governmental policy on exemptions and grants conforms to the dual constitutional guarantee of free exercise and no establishment.

The complexity of American Church-State relationships is further illustrated by the fact that both Federal and State legislatures have constantly co-ordinated the tax treatment of religious organizations with that given to a wide variety of other types of nonprofit educational and charitable organizations.[105] In part, this co-ordination can be explained by the substantial engagement of the churches in charitable and educational activities. This explanation, however, may not be sufficient with respect to religious organizations that are exclusively concerned with religious worship. Legislatures have given the same tax treatment to sanctuaries as to scientific centers. It may be true that the constitutional justifications for this similarity of treatment may not be the same in both instances; it is certainly not true, however, that it is impossible for the constitutional justifications to be different. Proving that a house of worship stands in a different constitutional relationship to the government than a research center does not prove that the government is compelled to tax the sanctuary.

If, again contrary to our whole tradition, houses of worship were the only institutions given *ad valorem* tax exemptions, such unique tax treatment might raise an issue respecting an unconstitutional preference of religion. On the other hand, if houses of worship were the

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[105]Cf. the text of the current State statutes and constitutional provisions in Appendix B, found in the Supplement filed with this brief.

only voluntary, nonprofit institutions denied tax exemptions, there would be a very serious question of an unconstitutional discrimination against religion. The fact, however, is that the Federal and State governments have broadly structured the type of exemption at bar in this case, with the result that neither preference nor discrimination is at issue.

In approaching the permissibility of the New York type of exemption within the total framework of American tax and Church-State policies, the Court will find valuable guidance in its earlier decisions in *Jones v. Opelika,*[106] *Murdock v. Pennsylvania,*[107] and *Follett v. Town of McCormick.*[108]

In these three cases the Court confronted for the first time the problem of the relationship between the taxing power and the free exercise of religion. The Court's answer to the problem was unequivocal: government cannot tax a religious activity, even through the medium of a general, nondiscriminatory license tax on door-to-door selling of books, pamphlets and wares. The occupation of the colporteur, itinerant, or established in one community, was protected against the general peddler's tax, because the nature of the tax made it a prior restraint on the free exercise of religion. The Court also gave a second reason: the tax, if legitimate in principle, could spread in such a way as to make it financially impossible for religious sects like the Jehovah

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[106]316 U.S. 584 (1942), *reversed on rehearing* 319 U.S. 104 (1943).

[107]319 U.S. 105 (1943).

[108]321 U.S. 573 (1944).

Witnesses to carry on one of their fundamental religious activities. Mr. Justice Douglas made the point cogently for the Court in *Murdock v. Pennsylvania:* "Freedom of speech, freedom of the press, freedom of religion are available to all, not merely to those who can pay their own way."[109]

*Murdock*, *Jones* and *Follett* stand squarely for the proposition that a religious exemption is *mandatory* where the occupational tax falls on the exercise of a religious activity and is of such a nature as to tend to make the continued exercise of the activity impossible. It can scarcely be doubted that this is sound constitutional doctrine today. If it is not, then the State and Federal governments would be free to tax preachers for giving sermons, priests for saying Mass, and rabbis for conducting Bar-Mitzvahs. The exemption from such taxes is *essential* for free exercise, because taxation is *incompatible* with free exercise. Just as the No Establishment Clause is a specific limitation on the taxing and spending power,[110] so is the Free Exercise Clause.

In deciding that Free Exercise guarantees had been breached in *Murdock, Jones* and *Follett,* the Court was careful not to give religious groups blanket constitutional protection against all financial burdens of government.[111]

The question whether the government *might* impose the general *ad valorem* taxes on property used or

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[109]319 U.S. at 111. Mr. Justice Douglas, of course, did not mean that government must *affirmatively* finance the free exercise of religion. The precise point was the necessity, in this case, of an *exemption.*

[110]Flast v. Cohen, 392 U.S. 83, 104 (1968).

[111]Cf. 319 U.S. at 112; 321 U.S. at 577-78.

employed in connection with religious activities was specifically distinguished from the question of license taxes. What, however, is extremely significant is that the majority of the Court never even raised the question of the constitutional permissibility of the traditional practice of exempting religious groups from general property taxes. Such permissibility seems to have been taken completely for granted.

*Everson v. Board of Education*[112] was decided three years after *Follett v. Town of McCormick*. The No Establishment language of *Everson* is clear and emphatic: government cannot tax to raise funds to support strictly religious activities. Yet there is not the slightest indication in the majority or minority opinions in *Everson* that members of the Court saw any inconsistency between what they said in *Everson* and what they had said so recently in *Murdock*, *Jones* and *Follett*. Indeed, the *Everson* majority cited *Murdock* as its authority for the incorporation of the religious guarantees of the First Amendment into the Fourteenth.[113]

One year after *Everson*, this Court invalidated a public school "on-the-premises" released-time program.[114] Five years after *Everson*, this Court sustained a different kind of released-time program, under which the public school accommodated its schedule to off-the-premises religious instruction.[115] The fundamental distinction between the

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[112] 330 U.S. 1 (1947).

[113] 330 U.S. at 8.

[114] *McCollum v. Board of Education*, 333 U.S. 203 (1948).

[115] *Zorach v. Clauson*, 343 U.S. 306 (1952).

two cases, however, did not rest on the use or non-use of public property. The essential difference between the two cases was the difference between an affirmative, purposeful support of religion as such by the government—a support that involved public premises, public officials and public embarrassment of the children of dissenters—and a deliberate abstention by the government in the interest of accommodating the free exercise of religion. The exemption from public school attendance which *Zorach v. Clauson* approved was constitutional because it did not frustrate the secular educational efficiency of the public schools, did not coerce anyone in the practice of his own religion, and did not involve the government intimately with religion. On the positive side, the exemption from public school attendance accommodated the constitutional right of parents to provide an efficient system of formal religious instruction for their children.

There is nothing, of course, in the language of *Zorach v. Clauson* to suggest that a state *must* grant the type of religious accommodation afforded by New York in that case. The attack was on the permissibility of the accommodation, and the Court answered in terms of permissibility. Thus, the Court recognized that the No Establishment and Free Exercise Clauses leave open at least one area of religious accommodation to legislative discretion.

The next important Church-State decisions by this Court were the *Sunday Closing Law Cases.*[116] Here a number of Jewish merchants claimed that they had a

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[116] 366 U.S. 420, 582, 599, 617 (1961).

constitutional right to an exemption. In disallowing that claim, on the ground that a mandatory exemption might frustrate the secular purpose of the Sunday closing laws, the majority of the Court clearly suggested that the States were free to grant the exemptions, if they were willing to assume the burden of doing so. One year later, the Court sustained precisely such an exemption.[117] By these decisions, the Court has recognized that the No Establishment and Free Exercise Clauses do not settle all matters on a constitutional level: the wall of separation has not destroyed the field of legislative discretion.

It is now necessary for this Court to decide once again[118] whether this discretionary area includes the traditional exemption of religious properties from the general *ad valorem* tax. *Amicus* has already urged the legislative and judicial history of these exemptions as compelling proof of their constitutional permissibility. That proof is solidly reinforced by a consideration of the consequences that a constitutional mandate of imposing taxation would inflict on the fiscal separation of Church and State and on the free exercise of religion.

A. *Fiscal Separation*. If the States are forced by the strictures of the Fourteenth Amendment to tax, rather than permitted by its guarantees to exempt, church property devoted exclusively to church purposes, the States will find that they are more substantially involved

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[117] *Arlan's Dept. Store v. Kentucky*, 371 U.S. 218 (1962).

[118] *Amicus* has already discussed earlier decisions by this Court on the merits in *Heisey v. County of Alameda*, 352 U.S. 921 (1956) and *General Finance Corp. v. Archetto*, 369 U.S. 423 (1962).

than at present with the churches. It must be noted that, whether the States tax or not, they must identify the churches as churches–most importantly, to avoid both establishment and interference with free exercise. Identification of the churches, however, brings governmental involvement with religion to an end in the area of taxation, provided that the States are permitted to exempt church property used for exclusively religious purposes. On the other hand, if the States are compelled to tax such property, there must be continuous governmental action aimed precisely at assessing the property and collecting the tax.

The difficulties involved in determining the secular value of property committed to a religious use are enormous. Religious property as such is scarcely the subject of ordinary commerce, and it seems both indecent and dangerous to force a cold appraisal of its secular value by the States. What is a sanctuary worth, as a sanctuary, on the open market? If governments are forced to tax, their involvement with the churches will reach an unprecedented level of intimate financial scrutiny.

Tax exemptions of houses of worship have undoubtedly played an important role in maintaining religious peace in the United States. By keeping the tax collector away from the sanctuary, they have prevented innumerable controversies over the secular value of objects men hold most sacred. Moreover, by preventing even the possibility of governmental foreclosures for deficient taxes on the places where men worship, exemptions have reinforced, not undermined, religious peace and the wall of separation between Church and State.

Some of the staunchest public defenders of the strict wall of separation have admitted that, in actuality, the exemption of church property "creates no relationship between Church and State."[119] It might be more accurate to say that it creates a relationship of minimal, healthy and neutral involvement. If State taxation becomes compulsory, the commendable goal of maintaining freedom of the churches from intimate governmental scrutiny will necessarily have been impaired. The good sense of not having the state undertake the role of tax collector and lien enforcer so far as church properties used for religious worship are concerned is obvious by inspection. We fail to see how abolition of the traditional practice of State exemption would further the constitutional ideal of separation of Church and State. Quite to the contrary, we believe it would be an unfortunate departure from that ideal, and a disservice to the States quite as much as to the churches.

B. *Free Exercise.* *Amicus* also believes it indisputable that, in the practical order of things, the compulsory elimination of tax exemptions for houses of worship might substantially impair the flourishing of religious liberty in the United States.

While all churches would be affected, it would be the smaller, rural country churches and the churches of the depressed center-city sectors of the large metropolitan areas that would be most hurt, if their dwindling, and frequently impecunious, congregations were required to pay taxes on church property. The assessed valuation might be substantial, if the norm of the best use to which the property might be put were employed. On the other hand, the ability of small rural and center-city

[119]Agnes E. Meyer, *The School, the State, and the Church,* Atlantic Monthly 45, 48 (Nov., 1948).

congregations to pay the taxes assessed on such a valuation would be extremely circumscribed.

Under a system of compulsory taxation, the larger churches would have a distinct financial advantage over the smaller ones. Compulsory taxation might force many small, independent churches to curtail their religious functions, merge with a denomination whose financial resources were more adequate than theirs, or even go out of existence. Thus, the religious pluralism that is characteristic of America and specially protected by the First Amendment would be substantially impaired should the New York type of exemption be forbidden by this Court.

C. *Burdens and Benefits.* Against the many arguments supporting the constitutionality of the New York type of exemption, there is one fundamental argument urged by those who seek the abolition of the exemption. This is the contention that the exemption forces them to pay more than they would otherwise have to pay in the way of taxes, and therefore to contribute to the support of the churches. *Amicus* has already pointed to the total lack of proof that appellant's taxes would in fact be reduced by the abolition of the New York exemption. There are, however, other compelling reasons for rejecting the argument based on the "burden" that exemptions allegedly impose on the nonchurchgoer, the nonbeliever, or the believer who does not believe in exemptions.

The first reason is that the "burden" falls equally on all taxable property owners, without distinction as to their religion or lack of it. Property taxes are not taxes *for the churches;* they are part of the basic revenue of the State needed to pay for its *general secular services to the entire community.* When appellant complains

that he does not receive his proportionate share of tax benefits because he does not belong to any church, he is in exactly the same position as other members of the community who object to this or that tax on the ground that they individually do not benefit from it at all or at least not as much as others.

The second fallacy in the "burden" argument is its complete misconception of constitutional rights to equality of tax treatment. Some Americans bear more of the cost of government than others, but there is no constitutional violation unless two persons in precisely the same economic and legal situation are treated differently by the government. When the legislature varies tax liabilities according to significant differences in economic and legal status, the legislature is distributing tax burdens in a constitutional and equitable manner. There is no constitutional mandate that every piece of property, or that every person and institution, be taxed. When the legislature grants the same tax exemption to houses of worship that it concedes to a wide variety of other private, voluntary, nonprofit organizations, the legislature may be "burdening" the appellant in common with all other taxpayers, but proof of a tax burden is no proof whatsoever of unconstitutionality.

Moreover, to look only at the burden is to miss the enormous benefit that such exemptions confer on American society. This is particularly true of religious exemptions from general secular laws. They greatly enhance religious liberty in a society as deeply pluralistic as our own. They express the deep-rooted and characteristic policy of not compelling conformity where conformity is not essential to the health, peace and prosperity of our country. To destroy religious exemptions in the name of preventing "burdens" on taxpayers (or "aid" to religion) would be to destroy the American

tradition of as much governmental accommodation as possible to the interests of religious liberty.

D. *Freedom of Conscience.* In addition to making the argument from financial "burden," appellant alleges that tax exemptions of houses of worship interfere with his freedom of conscience. This interference, however, amounts to nothing more than the State's adoption of a tax policy with which appellant disagrees in conscience. Appellant is not compelled to go to church or profess a creed. He is not compelled to pay any taxes levied for the support of religious worship. He has not been put under any civil disability or criminal penalty because of his religion. He is as free as any other American to worship in accordance with the dictates of his conscience.

From the very beginning, we have sought to accommodate our laws so that every citizen could live in as much harmony as possible with his conscience and his government. It is not possible, however, in a nation as religiously diverse as our own, to give every citizen's conscience a right of veto over governmental policy. Appellant is free to hold his conscientious convictions, but he has no right, merely because they are conscientious, to impose them as the law of the land.[120]

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[120]During the proceedings in the First Congress (1789) over the wording of the Bill of Rights to be submitted to the States, there were repeated efforts to add a "rights of conscience" clause to the No Establishment and Free Exercise guarantees. All such efforts, however, failed. See Antieau, Downey, and Roberts, Freedom from Federal Establishment 128-31 (1964). In view of this deliberate action by the First Congress, there is no historical basis for classifying mere disagreement in conscience as a constitutional injury.

In deciding where to draw the line between accommodation and non-accommodation of the individual conscience, our Nation has been guided by eminently practical, as well as constitutional, considerations of the degree of interference with essential secular objectives that accommodation involves, and of the degree of serious, personal hurt to the individual citizen that non-accommodation involves. On the basis of that distinction, it is manifest that tax exemptions of houses of worship do not paralyze the public revenue, and that taxation of such properties would involve the government very intimately with the churches and might well impose a significant burden on the religious liberty of many Americans. Thus, the importance of the accommodation far outweighs the financial burden, if any, on the government and on those who conscientiously disagree with the exemption policy.[121]

The tradition of tax exemptions which appellant requests the Court to strike down is a "rationally conceived and deep-seated policy, and not an accidental or

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[121] Cf. Chief Justice Warren's discussion of the constitutionality of indirect burdens on the free exercise of religion in *Braunfeld v. Brown*, 366 U.S. 599, 603-9 (1961), and especially the following passage: "Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference. . . . Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment." 366 U.S. at 606-7. What the Chief Justice said of economic disadvantages is even more applicable to conscientious disagreements with governmental policies.

vestigial survival of outmoded practices."[122] In part, it is a public policy which is deeply rooted in the attitude of the people toward religious liberty—an attitude which is as important today as it was when the Constitution, the Bill of Rights and the Fourteenth Amendment were adopted.

In a religiously pluralist nation like America, it is inevitable that the rationale of this public attitude toward tax exemption for church properties may differ somewhat from State to State and church to church. The national practice of permitting religious tax exemptions rests on a meld of both long-espoused philosophical and religious thought and widely held sociological convictions. The exemption of religious property is an undeniable and conspicuous aspect of the Nation's mores and constitutional structure.

Planted firmly in the Country's constitutional history, but at the same time transcending and illuminating that history, the venerable practice of permitting religious tax exemptions should be "in the highest degree persuasive, if not absolutely controlling,"[123] on the question of the proper construction of the religious guarantees of the First and Fourteenth Amendments.

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[122]Kauper, *The Constitutionality of Tax Exemptions for Religious Activities*, The Wall Between Church and State 95, 110 (Oaks Ed., 1963). Professor Kauper's article is by far the best modern treatment of the constitutionality of State property-tax exemptions of religious institutions.

[123]Cf. United States v. Graham, 110 U.S. 219, 221 (1884).

## VIII.
## Probable Practical Consequences If the Exemptions Were Prohibited

This Court recognized many years ago that "Taxation is eminently practical, and is in fact brought to every man's door, and . . . a tax should be regarded in its actual, practical results, rather than with reference to . . . theoretical or abstract ideas . . . ."[124] The taxation of houses of worship and other types of religious organizations would produce undesirable changes in the social order. The State, the Church, and society as a whole would each experience some significantly adverse impact. The wisdom of the long-standing legislative policy favoring religious exemptions is so great that this Court should not compel the abandonment of that policy on the basis of the wholly unconvincing Fourteenth Amendment contentions of the appellant.

A. *The Impact on the State.* If the States are held to be barred on constitutional grounds from permitting tax exemption of houses of worship, there will be no net financial gain, but perhaps a loss, to the State and there will ensue a substantial curtailment of valuable public benefit services conducted by the agencies of religious organizations, a slack which the State will have to take up itself.

Critics of the practice of tax exemption have often assigned financial reasons in urging that it cease.[125] In

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[124] *Nicol v. Ames*, 173 U.S. 509, 516 (1899).

[125] Paulsen, *supra* note 63, at 155-156. See also the brief *amicus curiae* offered in this case by Mrs. O'Hair and the Society of Separationists, at 28-33.

December 1875, President Grant, in his annual message to the Congress, previously referred to in this brief,[126] expressed his apprehension about the amount of "church property in the United States which paid no tax, municipal or State, . . ." President Grant told the Congress that tax exempt church property had reached the value of $1 billion in 1875.[127] Critics in more modern times continue to advance the same argument.[128] However, as one of those critics candidly conceded, it "is very difficult to make out a convincing factual case for eliminating religious tax exemptions . . . on the basis of the existing data."[129]

So far as New York is concerned, studies conducted over the years beginning in 1920 through 1966 show that the total value of all private exempt property is not large proportionally to the total assessed valuation of all real estate. Secondly, the proportion of all exempt property represented by church-owned property is an extremely modest fraction of total exempt property of all sort. Finally, if one were able to break down the religious property used exclusively for places of worship, as opposed to other property owned by religious organizations, the net total of that property obviously would be less than the total assigned for religious-owned exempt

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[126] *Supra*, p. 42.

[127] 4 Cong. Rec. 175 (1875).

[128] Stimson, *The Exemption of Churches From Taxation*, 18 Taxes 361, 364 (1940); Blake, *Tax Exemption and the Church*, Christianity Today 7 (August 3, 1959).

[129] Paulsen, *supra* note 63, at 156.

property. Set out in the footnotes is a summary of the tax studies referred to and the statistical evidence drawn from them.[130] Of special interest may be a 1967 report on real estate tax exemptions in New York City which indicates that, out of a total of tax exempt property in New York City exceeding $15 billion, a little less than $700 million, or 4.9% of that total, represented religious property.[131] The studies cited in the footnotes

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[130]In 1920 the assessed valuation of real property subject to taxation in New York was $14,596,000,000, while the value of *all* tax-exempt realty was $2,997,000,000. The percentage ratio of tax-exempt real property to all assessed property was 20.5%. Special Joint Committee On Taxation and Retrenchment, Tax Exemption In State of New York 37 (1927). In 1930, this percentage ratio was 22.9%. Bailey, Tax Exemption In New York 15 (1932). In that year a special committee concluded that contrary "to the general impression exemptions to religious and charitable institutions do not bulk large in the aggregate factors." Report of the New York State Commission For the Revision of the Tax Laws 121 (1932). In 1932, the total value of *all* tax exempt property was $6,367,000,000. Of this total, however, 78% represented exemptions for governmentally owned property, Federal, State, county and local. The figure for religious property exemptions in 1932 was $609,000,000, or 9.54% of the total of all tax exempt property in New York. Tobin, Hannan and Tolman, The Exemption From Taxation of Privately Owned Real Property Used For Religious, Charitable and Educational Purposes In New York State 42 (1934). In 1959, the great bulk of tax exempt property in New York (78%) continued to be publicly owned property, In that year, only 6.3% of the property exempted from taxes represented property owned by religious institutions. State of New York, Temporary Committee On the Revision and Simplification of the Constitution, Staff Report on Tax Exemptions (No. 28) 3 (1959).

[131]Real Estate Tax Exemption In New York City—A Design For Reform, Citizens Budget Commission (1967). In 1966, the total of all exempt private property in New York City was $2,743,660,916, of which $698,339,020 was religious held prop-

rather persuasively support Dean Paulsen's conclusion that it is very difficult to make out a case for the proposition than an elimination of the tax exemptions for all property owned by religious organizations, including, for example, hospitals and schools, as well as churches (much less elimination of the much smaller amount of property used exclusively for religious worship) would provide a net financial gain to the State.[132]

The elimination of tax exemption for religious property would produce a substantial curtailment in the social welfare services carried on by the churches and their affiliated agencies, services, the performance of which would then have to be taken up by the State.[133] Thus in the long run, elimination of the exemption might well bring about an increase, not a decrease, in the tax burden of its citizens. In summary, the financial consequences to the States, should exemptions of the type at issue here be eliminated, would be a *de minimis* gain at best and a net loss in revenue at worst. The critics who oppose exemptions for church owned prop-

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erty. *Id.* at 26. In 1966, tax exemptions afforded public bodies, including the United States, the United Nations, the State of New York, the City of New York, public housing and other public authorities, exceeded $12,500,000,000. *Id.* at 37, 40, 44, 46, 53 and 56. Exemptions for federally aided housing alone in New York City, for example, exceeded the religious property exempted by $13 million. *Id.* at 56.

[132]Paulsen, *supra* note 63, at 156. On the local level, a New York committee concluded that "there is no relation between the amount of tax exempt property in a given city or town and the cost of government or the local tax rate. . . ." Special Joint Committee, *supra* note 130, at 13, 49.

[133]Tolman, *Tax Exemption In New York State*, The Tax Magazine 1 (June 1935).

erty on alleged financial grounds take their stand on an unproven and unconvincing ground.

Financial considerations aside, there can be little doubt that additional burdens would be thrown upon the State, if, as a result of the elimination of tax exemptions, the churches and their affiliated institutions were forced to reduce the public benefit activities which they now conduct. Religious organizations make vast contributions to the general welfare of the communities in which they are located. We have previously provided some indication of the scope of those activities conducted by agencies of the Catholic Church in America.[134] Most of the churches perform similar services throughout the communities of the Country. Wholly apart from the spiritual uplift and moral inspiration which churches attempt to engender, they underwrite and perform a very substantial part of the charity and social welfare efforts conducted in the private sector of society. As the Maryland Court of Appeals recently said:

> "It is not disputed that today religious organizations, as a major part of their functions, carry on activities secular in nature, of substantial benefit to the community, such as aid to the poor and aged, day nurseries, care of the sick and efforts to eliminate racial inequalities. Programs such as these serve public needs; the performance of these functions by private agencies saves the State the expense of providing the same services."[135]

The Maryland Court of Appeals also recognized another aspect of the presence of churches in a community

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[134] *Supra*, pp. 3-4.

[135] *Murray v. Comptroller of the Treasury*, 241 Md. 383, 401 216 A.2d 897, 907 (1966), *cert. den.* 385 U.S. 816 (1966).

that has relevance in assessing tax and revenue consequences of exemptions for churches, when it noted that their existence and the activities they carry on help "attract persons to communities and . . . tend to increase the general tax assessment base."[136]

Such reliable statistics as are available portray concretely the material value of the great variety and extensive scope of the general welfare activities conducted by the churches of this Country. We believe the proposition self evident that, if church tax exemptions are eliminated, one of the immediate consequences to the State will be additional burdens thrust upon it, in terms of both money and effort, to assume the performance of public welfare responsibilities which the churches will have been forced to cut back.

The probability of significant adverse consequences to the States, should they be denied the right to exempt church property from taxation, itself furnishes a persuasive ground for leaving the granting or denial of such exemptions to the discretion of the States. "The exemption of property from taxation is a question of policy and not of power."[137] And, while "the line between the taxable and the immune [often] has been drawn by an unsteady hand,"[138] it cannot be fairly maintained that the exemptions challenged in this litigation have no reasonable relationship to the achievement and protection of legitimate secular concerns of the State.

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[136] 241 Md. at 402, 216 A.2d at 908.

[137] *State of Ohio v. Knopp*, 57 U.S. 369, 384 (1853).

[138] *United States v. Allegheny Co.*, 322 U.S. 174, 176 (1944).

B. *The Adverse Effect on the Churches.* The curtailment of social welfare services that would result from the imposition of taxes would be a loss not only to the State, but to the churches as well. To the extent that a church must reduce the scope and tempo of its good works, it is *pro tanto* less a "religious" organization than it was before. This is all the more true today, when the churches are more intensely concerned with the social problems of our Country than they have ever been in the past.

It is self-evident that, if the church properties must be taxed, there will have to be some retrenchment in activities conducted by the churches in order to bear the increased economic burden thus thrust upon them. Like charitable institutions which also are beneficiaries of tax exemption, church organizations perform many services identical with those carried on by such institutions, such as the maintenance of old people's homes, schools, orphanages, hospitals, and related public welfare services.[139] Could it be seriously argued that charitable corporations would not have to restrict the scope of their activities if they were made subject to tax? So, too, if church property is required to be taxed rather than being permitted exemption from taxation, it will be unavoidable that the churches will have to effect a reduction in the types and quantity of public welfare services previously undertaken by them for the benefit of the community as a whole. What that reduction would amount to in particular cases would depend on the

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[139] For a detailed account of the activities of churches in a typical American community, see Douglas, The Springfield Church Survey (1926); Paulsen, *supra* note 63, at 151.

financial resources of the church concerned and the community involved. In New York City, for example, it has been estimated that, if the tax exemption on church property were eliminated, churches there would have to pay approximately $35 million in taxes to the City.[140] Could such an increased financial burden be met by the churches of that city without substantial decreases in their operating costs?

C. *The Structure of American Society Would Suffer.* The social structure of our country is complex. At its base stand the American people. These people have created our Federal and State governments, organized our churches, and generated a wide variety of other private, nonprofit voluntary institutions. Tax exemptions have played an important role in keeping this complex societal structure in balance. Any repudiation by this Court of the oldest, most deliberate and most cherished tax exemption in the United States would inevitably disturb and weaken the structure of American society. Such disturbance could not possibly be justified except on the basis of compelling constitutional reasons—reasons that manifestly do not exist in this case.

## CONCLUSION

For the reasons stated in its brief, this *amicus* urges that the Court either affirm the decision of the Court of Appeals of New York or vacate its order of June 16, 1969 noting probable jurisdiction in this case and

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[140] Real Estate Tax Exemption In New York City—A Design For Reform, *supra* note 131, at 11; Morgan, The Politics of Religious Conflict 42 (1968).

grant appellee's motion to dismiss the appeal for want of a properly presented federal question.

Respectfully submitted,

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